INDEX TO JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10007

ROBERT D. ELDER, *Appellant*,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Appellee.

No. 10008

GREENE CHANDLER FURMAN, *Appellant*,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Appellee.

Appeals from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

Filed June 5 1947

In the District Court of the United States
for the District of Columbia.

Civil Action No. 2336

ROBERT D. ELDER, 4233 32nd Road South, Arlington, Virginia, *Plaintiff*

v.

CLINTON P. ANDERSON, Secretary of Agriculture, Washington, D. C., *Defendant*

Suit for a Temporary and Permanent Injunction to Restrain the Defendant from Separating the Plaintiff, an Honorably Discharged Veteran of the United States, from a Position as Attorney under the Jurisdiction of the Defendant, for a Declaratory Judgment, and For Such Other Relief as May Be Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

1. That the plaintiff is a citizen of the United States, and resides at 4233 32nd Road South, Arlington, Virginia, and that his permanent domicile is in the City of Leadville, State of Colorado.

2. That the defendant is the duly appointed, acting and qualified Secretary of the United States Department of Agriculture, and in such capacity is charged by law with the administration of all laws enacted by the Congress of the United States relating to the United States Department of Agriculture, and is specifically charged by law with the employment of personnel under the jurisdiction of the United States Department of Agriculture.

3. That employees of the United States Department of Agriculture are required to be qualified in their various employment positions according to provisions of the Civil Service Act and the rules and regulations of the United

States Civil Service Commission, and are in a classification which is generally known as the classified and unclassified civil service of the United States. That the defend-
2 ant is required under the laws of the United States to fill any and all positions in the United States Department of Agriculture falling within the classified and unclassified civil service from persons who have been found to be duly qualified for such positions by the United States Civil Service Commission.

4. That the plaintiff enlisted in the military service of the United States in August, 1917, served in the infantry branch of the armed forces for over one year thereafter, and was separated therefrom under honorable conditions pursuant to an honorable discharge December 9, 1918 as Captain, Infantry, United States Army.

5. That the plaintiff took the written Federal Civil Service Legal Examination given by the United States Civil Service Commission in September, 1942, that he was qualified thereunder, and that his name was placed on the register of Attorney eligibles.

6. That on or about August 1, 1943, the plaintiff was employed as Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture, Washington, D. C., that he thereafter successfully completed his probationary or trial period of one year, that he has at all times since August 1, 1943 served continuously in said position until the present time, and that he is still actively engaged in the performance of the functions of said position.

7. That, during all times in said continuous period of service as Attorney P-3 for four years less approximately two months, the efficiency rating of plaintiff has been good or better and is now "Very Good."

8. That the plaintiff has established Veteran's Preference under the laws of the United States and the rules and regulations of the United States Civil Service Commission and of the United States Department of Agriculture and is a Veteran's Preference eligible employed on active duty in

the Farmers Home Division of the Office of the Solicitor, United States Department of Agriculture, being employed previous thereto in the Production and Subsistence Division thereof prior to May 29, 1947.

3 9. That about 5:30 P. M. on May 29, 1947, the plaintiff received a written notice on Form OP-16, over the signature of W. Carroll Hunter, Solicitor of the United States Department of Agriculture, stating that a reduction in force brought about by lack of funds necessitated plaintiff being separated, effective on or after June 30, 1947 c. o. b. and that plaintiff's last day of active duty in his present position will be June 6, 1947; and that the original of said notice on Form OP-16 is hereto attached as Exhibit "A" and by reference made a part hereof.

10. That the plaintiff was also in receipt of a mimeographed memorandum over the signature of W. Carroll Hunter dated May 29, 1947, directed from the Solicitor to All Employees of the Office of the Solicitor, stating in part that "The following reorganization of the Washington Office is hereby made effective immediately . . . The functions of the former Farm Ownership Division and Production and Subsistence Division are transferred to the Farmers Home Division. Mr. Howard Rooney will be Chief of this Division." That the original of said mimeographed memorandum is hereto attached as Exhibit "B" and by reference made a part hereof.

11. That on June 4, 1947, the plaintiff prepared and delivered to the said W. Carroll Hunter, Solicitor, a letter denying the legality of said purported notice of separation, stating the reasons for such illegality, requesting that said notice of separation be rescinded, and requesting that plaintiff be retained in his position and employment; and that a copy of said letter is hereto attached as Exhibit "C" and by reference made a part hereof. That to said letter there has been up to this time no response.

12. That plaintiff's military service in the armed forces during World War One entitles plaintiff to preference in

certifications for appointment, in appointment, in reinstatement, in reemployment, and in retention in such position and functions, in accordance with the provisions of the Veterans' Preference Act of June 27, 1944 and of Sections 1, 12, 14, 15, and other applicable sections thereof (Title 5, Sections 851, 861, 863, 864, U. S. C. A.).

13. That inter alia such law provides (5 U. S. C. A. Sec. 861): "That preference employees whose efficiency ratings are good or better shall be retained in preference to all competing employees". That plaintiff's efficiency rating has at all times been good or better. That plaintiff is informed and believes and so alleges that the personnel records of the Office of the Solicitor show that there are many Attorneys in the Office of the Solicitor, Department of Agriculture, who did not receive any such notice of separation and who do not have any status as military preference employees for such retention, and to whom notice of separation could and should have been issued for the specified purpose of reduction of personnel by reason of lack of funds; and that the issuance of such purported notice of separation to plaintiff, a preference employee under the Veterans' Preference Act of 1944, was contrary to law and in violation of the rights of plaintiff as such preference employee in the premises.

14. That inter alia such law provides (5 U. S. C. A. Sec. 861): "That when any or all of the functions of any agency are transferred to, or where any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions." That plaintiff is qualified for such position and functions, that plaintiff has been for several years and is now engaged in the satisfactory performance of the duties of such position and functions, and

that plaintiff is entitled under the law to preference in transfer to or retention in such position and functions in such replacing agency, the Farmers Home Division, in the place and stead of the former Production and Subsistence Division.

15. That in the premises the purported notice of separation hereinabove alleged in Paragraph 9 and such attempted separation of plaintiff from his position and employment are unauthorized, illegal and void, but that a controversy exists between plaintiff and defendant in respect to the legality and sufficiency of such notice and attempted separation, and that plaintiff is entitled to a declaratory judgment with respect thereto.

16. That plaintiff further alleges that the law provides inter alia (5 U. S. C. A. Sec. 863): that such "indefinite preference eligible . . . shall have at least thirty days' advance notice . . . "; and that said purported notice of separation dated May 29, 1947 is defective in such respect and on such additional ground is unauthorized, illegal, and void.

17. That the plaintiff has made due demand upon the defendant, his agents and employees, that plaintiff be accorded rescission of said purported notice of separation and that plaintiff be retained in his said position and employment, but that the said defendant, his agents and employees charged by law with the administration and supervision of the employees of the United States Department of Agriculture and the Office of the Solicitor thereof have failed, refused, or neglected to rescind such purported notice of separation and to retain the plaintiff in his said position and employment, and that, unless the defendant is restrained from so doing by this Court, the defendant will wrongfully and illegally separate the plaintiff from his position and employment in Government service, and that the plaintiff has no adequate, speedy and practicable remedy at law.

WHEREFORE the plaintiff prays:

1. That due process of this Court issue directing and commanding the defendant to appear and answer this bill of complaint.

2. That this Court issue a temporary restraining order or temporary injunction restraining the defendant, his agents and employees, from separating the plaintiff from his position as Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture, until such time as the Court shall determine the issues involved in this litigation, and that the Court on final hearing order that the temporary restraining order or temporary injunction be made permanent.

3. That the Court render a declaratory judgment that the defendant's notice of separation dated May 29, 1947 purporting to separate plaintiff from his position and active performance of his functions thereunder was unlawful, illegal and void under the laws of the United States and that plaintiff is entitled to preference in retention and retention in such position until such time as he may be lawfully and properly removed or separated therefrom.

4. That because of the illegal and unlawful acts of the defendant the plaintiff have, and recover from the defendant personally, the costs of this action.

5. That the plaintiff have such other and further relief as to the Court may appear equitable and just.

ROBERT D. ELDER
Robert D. Elder, *Plaintiff*

C. L. DAWSON
C. L. Dawson
Attorney for the Plaintiff
917 15th Street, N. W.
Washington, D. C.

[Notarial Certificate omitted.]

• • • • • • • • • •

7 Filed Jun 5 1947

Plaintiff's Exhibit A.

Form OP-16 (Revised May 22, 1947)

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
(Bureau)

Washington, D. C.
(Location)

May 29 1947

Retention Subgroup of Employee B-1

To: Robert D. Elder.

From: Solicitor.

Subject: Notice To Employee Affected By Reduction In Force.

A reduction in force brought about by lack of funds necessitates your being separated, effective on or after June 30, 1947 c. o. b. Your last day of active duty in your present position will be Jun 6 1947 c. o. b.

You have the following rights and privileges:

1. If you are an employee in retention subgroup A-3 or A-4 or in retention group B or C, you are entitled to 30 days' minimum notice of reduction in force action. If you are an employee in retention subgroup A-1 or A-2 you are entitled under normal circumstances to 1 year's notice of separation. If you are an employee in subgroup A-1 or A-2 and you are given less than 1 year's notice, such notice is based on a waiver granted by the Civil Service Commission due to lack of funds. If you are an employee in subgroup A-1 or A-2 occupying a position subject to the Civil Service Act and you are given less than 1 year's notice, you are entitled to the same consideration for placement in other positions as you would have if given the 1 year's notice of separation.

2. After your last day of active duty the remainder of the notice period will consist of your accrued annual leave and

nonpay status thereafter. If you have any unused annual leave still to your credit as of the effective date of your separation you will be given a lump-sum payment for this amount.

3. You may examine Personnel Circular No. 94 which contains reduction-in-force procedures as they apply in the Department, records which form the basis of this reduction in force, and the list on which your name appears. These are available Personnel Section, Room 2103 South Building.

4. You may appeal to the Civil Service Commission if you consider that this proposed action violates your rights or if you are denied the right to examine records, regulations and/or reduction-in-force lists. You have 10 days from receipt of this notice to appeal to the appropriate Civil Service Office which is located at 7th and F Streets, N. W., Washington, D. C.

8 5. Your personnel representative, Pauline C. Wood will be glad to give you information regarding the procedure for exercising any restoration or reemployment rights which you may have in another Federal agency, the channels through which you may apply for other government employment and the procedure for securing a refund of retirement deductions provided that you are eligible to apply for such refund. Upon request, you will be issued a "Release From Employment" to serve as your statement of availability when seeking other Federal employment.

6. You are entitled to further consideration for placement in other positions. Appropriate action is being recommended to assure this consideration.*

W. CARROLL HUNTER,
Employment Officer.

Note: This notice may be considered based on the availability of appropriations.

* Applicable only to employees in retention Group A and subgroup B-1 occupying positions subject to the Civil Service Act.

9 Filed Jun 5 1947

Plaintiff's Exhibit C.

Washington 25, D. C.

Honorable W. Carroll Hunter
Solicitor
Department of Agriculture
Washington, D. C.

Dear Mr. Hunter:

Subject: Veteran's Preference for Retention or Reinstatement in Employment.

On May 29, 1947 I received notice on Form OP-16, over your signature, that a reduction in force brought about by lack of funds necessitated my being separated, effective on or after June 30, 1947 c.o.b. and that my last day of active duty in my present position will be June 6, 1947.

On June 5, 1947 I first received your mimeographed memorandum dated May 29, 1947 to all employees of the Office of the Solicitor stating that "The following reorganization of the Washington Office is hereby made effective immediately . . . The functions of the former Farm Ownership Division and Production and Subsistence Divisions are transferred to the Farmers Home Division. Mr. Howard Rooney will be Chief of this Division." Accordingly, I have been and am engaged in performance of the functions in the Farmers Home Division substantially as in the previously designated production and subsistence Division.

I respectfully request that the aforesaid notice of separation dated May 29, 1947 be rescinded, and that I be certified for retention, appointment or reappointment with a view to continued employment in the functions of said Farmers Home Division as the same have been, are being, and may be assigned to me in such civilian position for the following reasons:

(1) That I have served in the infantry branch of the armed forces of the United States for over one year, during the World War One of 1917-1918, and have been separated therefrom under honorable conditions pursuant to an honorable discharge dated December 9, 1918, as Captain, Infantry, United States Army, and as the same, so appears in the personnel records of the Office of the Solicitor.

(2) That by reason of such military service in the armed forces I am entitled to preference in certification for appointment, in appointment, in reinstatement, in reemployment; and in retention in such civilian position, in accordance with the provisions of the Veterans Preference Act of June 27, 1944 and of Sections 1, 12, 14, 15, and other applicable sections thereof (Title 5, Secs. 851, 861, 863, 864, U.S.C.A.).

(3) That inter alia, the law provides (5 U.S.C.A. 861): "That preference employees whose efficiency ratings are good or better shall be retained in preference to all competing employees . . . [underscoring supplied] that my last efficiency rating was "Very Good"; that the personnel records of the Office of the Solicitor show that there are many Attorneys in the Office of the Solicitor who did not receive notice of separation and who do not have status as military preference employees for such retention, and to whom notice of separation could and should have been issued for the specified purpose of reduction of personnel by reason of lack of funds; and that the issuance of notice of separation to the undersigned, a preference employee, was contrary to law and in violation of the rights of such preference employee in the premises.

(4) That, inter alia, the law provides (5 U.S.C.A. Sec. 861): "That when any or all of the functions of any agency are transferred to, or where any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency or agencies, for employment in

positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions;" that the undersigned is qualified for such position and functions, and has been for several years and is now engaged in the performance of the duties of such position and functions, and is entitled under the law to preference in transfer to such position and functions in such replacing agency, Farmers Home Division.

(5) That, in view of the foregoing, the notice of separation to the undersigned was issued inadvertently, was in error, was in violation of the veteran's preference rights of the undersigned in the premises, and should be rescinded.

(6) That, inter alia, the law provides (5 U.S.C.A. Sec. 863) that such "indefinite preference eligible . . . shall have at least thirty days' advance written notice . . ."; that said purported notice of separation dated May 29, 1947 is defective in such respect, and for such additional reason should be rescinded.

Your usual prompt response in such matters will be more than appreciated.

11 I take this opportunity to express my high personal esteem and my deep appreciation of the privilege of association with you in legal service for the United States of America.

Sincerely yours,

ROBERT D. ELDER,
Attorney, P-3, B-1.

. . . . . .

12 Filed Jan 24 1947

Civil Action No. 2336-47

Amended Complaint.

Suit to Compel the Retention of Plaintiff, An Honorably Discharged Veteran of the United States, In a Position as Attorney Under the Jurisdiction of the Defendant, For a Declaratory Judgment, and For Such Other and Further Relief as to the Court May Appear Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

Plaintiff realleges Paragraphs 1 to 17 inclusive of the original complaint filed herein June 5, 1947, together with all exhibits and prayers for relief. Plaintiff further alleges:

18. That an actual controversy exists between plaintiff and defendant in respect to plaintiff's right to retention and that plaintiff is entitled to a declaratory judgment of this Court declaring that plaintiff has the right to be retained in his position in preference to all other competing employees and before any additional employee from any other source may be appointed for such position; that such right to retention is secured to plaintiff under Section 12 of the Veterans' Preference Act of 1944 (5 U. S. C. A. 861); that the words "in preference to all other competing employees" are used in Section 12 of the Act in the ordinary and usual sense of in preference to all other employees who are capable of performing work performed by plaintiff

13 in such position or who have been assigned or may be assigned to perform all or any part of such work in the place and stead of plaintiff, regardless of the formal designation of any of such other employees as in grades P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, or other grades. Such other employees, regardless of grade, must be held to be in the posture of striving and competing with plaintiff for the right to do the same work the plaintiff has been doing and

seeks to continue to do; and all such other competing employees must necessarily yield in this matter to the mandatory preference to be retained that is secured to plaintiff as a Veterans' Preference employee by Congress in this statute.

19. That the work, functions, and duties performed by plaintiff in his position still exist, will continue to exist, and must necessarily continue to be performed by an employee or employees capable of performing them. That as of the time of filing this amended complaint the work formerly performed by plaintiff is being assigned to and performed by other Attorneys in grades of P-7, P-6, P-5, P-4, who are thus supplanting and competing with plaintiff for performance of the work, service, duties and functions which plaintiff has been performing for years under assignments and is entitled to continue to perform. That the work, service, functions and duties, and work assignments of the Attorneys in the Office of the Solicitor, United States Department of Agriculture, are to a large extent interchangeable throughout the grades P-3 to P-7 inclusive, and plaintiff is informed and believes and so alleges that he is capable and qualified by experience and training to fill and discharge any of the work, service, functions, duties, and work assignments of Attorneys in any of the aforesaid grades. That plaintiff has in fact performed many of such work assignments, work, service, functions and duties of such grades P-3 to P-7 inclusive during the past four years less two months. That plaintiff has been a practicing attorney with years of experience in complicated litigation involving large sums of money and extensive property rights from 1915 on (see as counsel in chief for argument in 237 Fed. 966, CCA 8, year 1916, successful on appeal), and has appeared in argument before all the Colorado State and Federal
14 courts including the United States Circuit Court of Appeals (8th, 10th) and sundry State and Federal commissions throughout the years prior to 1943. That plaintiff has been successively a member of the House of

Representatives and the Senate of the State of Colorado, and is a graduate of Princeton University with degree of A. B., and of Columbia University Law School with degrees of A.M. and LL.B. in law.

20. That plaintiff is entitled to a declaratory judgment of this Court declaring that plaintiff has acquired and is entitled to competitive status as an Attorney in Government employment, together with all the rights and privileges appertaining to such competitive status, under Executive Order 9830 and also under Civil Service Rule III. That plaintiff is entitled to such declaratory judgment because of the following facts alleged herewith:

(a) That an actual controversy exists between plaintiff and defendant in respect to plaintiff's right or lack of right to such competitive status and his rights and privileges thereunder;

(b) That in September, 1942, the plaintiff took and received an eligible rating in a written open competitive examination given by the United States Civil Service Commission for the position of Attorney, such examination consuming a full working day pencil in hand at top pressure;

(c) That said open competive examination was appropriate for the position of Attorney afterwards and now occupied by plaintiff;

(d) That, as plaintiff is informed and believes and so alleges, upwards of 14,000 lawyers took said open competitive examination throughout the United States, of whom less than 2,000 received eligible ratings;

(e) That plaintiff received and was entitled to receive a probational appointment through said open competitive examination and under such appointment was placed on active duty on or about August 1, 1943, in the position of Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture;

(f) That said appointment was stated to be limited to the duration of the war and six months thereafter, but it was not limited to one year or less nor for any period that can

be accurately described as other than indefinite, since the war is still officially in esse and may well continue indefinitely, even beyond the reasonable hope of lifetime of both plaintiff and formal defendant in this suit, before being declared officially at an end, and plaintiff has already served for over four years less two months under such appointment; that such appointment does not come within the definition of a "temporary appointment" (Section 2.114, Civil Service Rule II, published May 1, 1947, at page 2834, Volume 12, Number 86 of the Federal Register), and accordingly said appointment is mandatorily a probational appointment pursuant to Section 2.113, Civil Service Rule II, published May 1, 1947 at page 2834, Volume 12, Number 86 of the Federal Register, which provides: "Probational appointment. (a) A person selected for other than temporary appointment shall be given a probational appointment. The first year of service under this appointment shall be a probationary period. . ."

(g) That plaintiff successfully completed said probationary period of one year and was officially notified of his completion thereof, and has satisfactorily served three years less two months in addition thereto;

(h) That the right to competitive status was accordingly acquired by and is secured to plaintiff by and under Section 3.1 (a) and also by and under Section 3.1 (b) (7) of Rule III, Part 3 of Executive Order No. 9830 dated February 24, 1947, published on page 1262 of the Federal Register of February 25, 1947, and republished as revised Civil Service Rules on page 2835 of the Federal Register of May 1, 1947, as Section 3.1 (a) and Section 3.1 (b) (7), which provide as follows: "Part 3—Acquisition of a Competitive Status—. Civil Service Rule III"—Sec. 3.1. Classes of persons who may acquire status. (a) A person may acquire a competitive status by probational appointment through competitive examination, or by statute, Executive order, or this Rule. (b) Subject to such noncompetitive examination time limits, or such other requirements as the Commission may pre-

scribe, the following classes of persons may acquire a competitive status: (1) . . . (7) An employee who has served at least one year and has received an eligible rating in an open competitive examination appropriate for the position occupied: Provided, that the lowest rating reached in the regular order of certification does not exceed his rating by more than five points; Provided further, that such employee is about to be replaced as a result of certification by the Commission. A non-veteran employee may not be granted status until all preference eligibles standing higher on the register have been given appropriate consideration under the Veterans' Preference Act."

(i) That plaintiff's probational appointment through said open competitive examination, and his permanent competitive status acquired as the result thereof, have been recognized, ratified and confirmed by the aforesaid official notification of plaintiff on or about August 3, 1944, that plaintiff had successfully completed his probational period of one year under such appointment;

(j) That plaintiff's probational appointment through said open competitive examination, and his permanent competitive status acquired as the result thereof, have been recognized, ratified and confirmed in each of three successive calendar years after 1944 by the granting and payment to plaintiff in each of the years 1945, 1946 and 1947 of a within-grade salary advancement under Section 7 of the Classification Act of March 4, 1923 as amended, and said within-grade salary advancements were on each occasion explicitly designated as such and were distinct from and in addition to the contemporaneous increases of salaries granted to Government employees by Congress for the purpose of meeting their increased cost of living; that such within-grade salary advancements are a privilege possessed solely by employees of permanent competitive status and are not and cannot be either granted or paid to any temporary employee but only to an employee of competitive status occupying a permanent position, as so provided by the express provisions of

Section 2.114 (f) of Part 2, Civil Service Rule II, published at page 2835 of the Federal Register of May 1, 1947, in Volume 12, Number 86 thereof, and by like rules in force prior thereto;

(k) That plaintiff's probational appointment through said open competitive examination, and his permanent competitive status acquired as the result thereof, have been recognized, ratified and confirmed at all times from and after August 3, 1944, by the bi-weekly deduction from plaintiff's salary, as paid, of proportionate amounts
17 thereof for the purpose of providing for plaintiff's retirement benefits, and all such amounts so deducted have been withheld from plaintiff in the Civil Service Retirement Fund subject to the Civil Service Retirement Act; that the benefits of said Civil Service Retirement Act, and all retirement benefits and salary deductions for the purpose thereof, are privileges possessed solely by employees of permanent competitive status, and are not and cannot be accorded to and/or deducted from the salary of any temporary employee, but such benefits can only be accorded to and salary deductions for such purpose can only be made from the salary of an employee of competitive status occupying a permanent position, as so limited by the express provisions of the same Section 2.114 (f) of Part 2, Civil Service Rule II, referred to under the foregoing sub-paragraph (j).

21. That on or after May 1, 1947, plaintiff received a mimeographed memorandum dated May 1, 1947, over the signature of W. Carroll Hunter, the Solicitor, a copy of which is hereto attached as Exhibit "D" and by reference made a part hereof. That in connection with same defendant made up a purported retention and separation register in which plaintiff was illegally assigned a right of retention below and inferior to that of a large number of non-veteran employees whose rights to retention in law and fact are below and inferior to the Veterans' Preference right of plaintiff to "be retained in preference to all other com-

peting employees". That said memorandum and the purpurported retention and separation lists assumed to have been made up thereunder, pursuant to which notice of separation was illegally issued to plaintiff May 29, 1947, were in violation of law and regulations, and were unauthorized and void insofar as the retention rights of plaintiff have been or may be adversely affected thereby; and that plaintiff is entitled to a declaratory judgment of this Court so declaring. That there have been violated thereby the following: Section 1753 of the Revised Statutes (5 U. S. C. A. 631; The Civil Service Act of January 16, 1883 as amended (22 Stat. 403); the Act of August 23, 1912, as amended by the Act of February 28, 1916 (5 U. S. C. A. 648); the Veterans' Preference Act of June 27, 1944 (5 U. S. C. A. 851 et seq.); the Appropriation Act of 1947 (Public Law 334—79th Cong.); Executive Order No. 9830 of February 24, 1947, published in the Federal Register of February 25, 1947, effective and republished in the Federal Register May 1, 1947, particularly Rule II and Rule III thereof, Rule VI "Exceptions from competitive service"; Title 5—Administrative Personnel—revised Civil Service Rules published in the Federal Register May 1, 1947, placing in effect as of that date Executive Order No. 9830 dated February 24, 1947; United States Civil Service Commission Departmental Circular No. 497 Supplement No. 2 dated April 15, 1947; and other statutes, Executive Orders, Rules, regulations, circulars and memoranda referred to, cited in, and connected therewith, all of which are also hereby pleaded by reference.

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That the defendant, his agents and employees, in violation of the above lawful provisions and in disregard of the fact that plaintiff has been and is competing with Attorneys of grades P-4, P-5, P-6, and P-7 for the right to perform work formerly performed by him, have unlawfully assumed to restrict plaintiff to a "competitive level" confined to grade P-3 Attorneys in a so-called Group B-1. That the defendant, his agents and attorneys and employees, have

in like illegal manner assumed to restrict plaintiff to a so-called "competitive area" confined to "the Washington Office". That such status, area and level restrictions were and are in violation of these statutes and are contrary to the order of your defendant, the Secretary of Agriculture, set forth in his Memorandum No. 1131 dated October 24, 1945, wherein this defendant proclaimed inter alia: "The obligation to continue them (veterans) in employment status is department-wide where there are positions available which they can fill." That a facsimile copy of said Memorandum No. 1131 dated October 24, 1945 is hereto attached as Exhibit "E" and by reference made a part hereof.

That there are many positions available, department-wide, which plaintiff can fill and the work of which he is capable of doing. That an actual controversy exists between plaintiff and defendant in regard to all the above matters and the illegality thereof, and that plaintiff is entitled to a declaratory judgment of this Court declaring that the plaintiff's Veterans' Preference right to retention in employment may not lawfully be restricted to any area less than department-wide, nor to any such formal level;

19 that plaintiff's right to retention must necessarily be extended to any position the work and duties of which the plaintiff has satisfactorily performed with an efficiency rating of good or better, and to any departmental position, regardless of its categorical level or alphabetical designation, the work and duties of which may reasonably be deemed within the capabilities of an employee of plaintiff's experience and training; that the mandatory requirements of the Veterans' Preference Act of 1944 are that a Veterans' Preference employee must be given any available work for which he is reasonably adapted, and where his efficiency rating in a position is good or better, such Veterans' Preference employee must be retained in such position in preference to any other employee or employees whatsoever, and so retained before any of the work, functions or duties of such position may be assigned or parceled out to any other

employee or employees; and so long as the efficiency rating of a Veterans' Preference employee as the occupant of a position is good or better, so long does he retain that position against all the world, under and by virtue of the provisions of this Act.

22. That prior to September, 1942, and prior to the enactment June 27, 1944 of the Veterans' Preference Act of 1944, the plaintiff had duly established Veterans' Preference eligibility under then existing laws and has at all times since September, 1942 been possessed of, entitled to the protection of, and vested with all rights and privileges granted under any existing law, including in particular the Act of August 23, 1912, c. 350, Sec. 4, 37 Stat. 413, as amended by the Act of February 28, 1916, c. 37, Sec. 1, 39 Stat. 15 (5 U. S. C. A. 648), which provides inter alia: "Provided, that in the event of reductions being made in the force of any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary." That plaintiff's rights under such existing law of 1912 are expressly secured and preserved by Section 18 of the Veterans' Preference Act of 1944, 58 Stat. 391 (5 U. S. C. A. 867) which provides inter alia: ". . . and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law. . ."

That an actual controversy exists between plaintiff and defendant in respect of plaintiff's possession of any of such rights of retention, security against discharge and reduction in pay, and that plaintiff is entitled to a declaratory judgment of this Court declaring that Plaintiff, as an honorably discharged soldier whose record is rated good or better with the Office of the Solicitor, United States Department of Agriculture, has the right, mandatory upon this defendant, his agent and employees, not to be discharged or dropped or reduced in rank or salary in the event of any reduction in force.

23. That the plaintiff has and will continue to have the lawful right to be on active duty in his position from and after June 6, 1947. That plaintiff is and will thereafter continue to be entitled to occupy the same status and privileges that were his at the time this suit was brought, and is and will thereafter be entitled to have the benefit of all compensation, benefits and privileges that would flow from his continuity of service on active duty from and after the close of business June 6, 1947. That, since the defendant, his agents and employees, were without authority to issue notice of separation to plaintiff in the premises, or to separate plaintiff, any such separation or exclusion of plaintiff from active duty by defendant, his agents and employees, pursuant to such illegal notice, is unlawful and will continue to be unlawful, and plaintiff will be entitled to an order of this Court directing defendant to restore plaintiff to active duty forthwith and holding that plaintiff has been continuously employed in the Office of the Solicitor, United States Department of Agriculture, from and after the close of business June 6, 1947, to and until the time of the final determination of this suit, and holding that plaintiff is entitled to have the benefit of all compensation, benefits and privileges that would flow from such continuity of service on active duty. That since the defendant has been notified of the pendency of this suit seeking an injunction against him, the defendant henceforth acts at his peril and subject to the power of the Court to restore the status.

21. That plaintiff's present salary is at the rate of $4,525.80 per annum. That plaintiff is informed by the personnel office of the Office of the Solicitor that he has eighty-seven days and four hours of accrued annual leave to his credit as of the close of business June 6, 1947. That plaintiff is entitled to all such accrued annual leave and to all of his accrued sick leave, none of which sick leave plaintiff has ever taken. That plaintiff is entitled to all annual and sick leave, and to all within grade promotions, all within-grade increases of salary, all retirement rights, and all

benefits, privileges and emoluments that would normally accrue to plaintiff's benefit during the period subsequent to his wrongful and illegal separation from active duty at the close of business June 6, 1947, to and until plaintiff's restoration to such active duty.

24. That on Monday, June 9, 1947, the first business day after June 6, 1947, the plaintiff reported in person for duty to the proper official and at the proper place for reporting for duty, namely to Mr. Howard Rooney, Chief of the Farmers Home Division, Office of the Solicitor, United States Department of Agriculture, Washington, D. C., in his office in the South Agriculture Building. The plaintiff thereupon demanded of said Chief that plaintiff be retained in his position of Attorney P-3 and retained on active duty and given work to do. That said Chief thereupon refused said demands and stated orally that plaintiff was definitely and finally separated from active duty and was on no account to do or be paid for doing any further Government work for the Department, and that plaintiff would be paid for nothing but his accumulated annual leave until final separation from his position pursuant to the notice of separation dated May 29, 1947. That plaintiff then made like demands upon Mr. Robert L. Farrington, Associate Solicitor over the Farmers Home Division, and upon Mr. W. Carroll Hunter, Solicitor and head of the Office of the Solicitor, United States Department of Agriculture, and finally, in writing, upon Hon. Clinton P. Anderson, Secretary of Agriculture, and that each of said officials refused plaintiff's demands. That throughout each and every business day since June 6, 1947 and until the time of filing this amended complaint, the plaintiff has been present in person at his office, Room
22 2340 in said Farmers Home Division, South Agriculture Building, and has daily requested work to do, and that each and all of such requests have been with uniform courtesy refused. That plaintiff is ready, able, willing and desirous of performing any work assignment that may be given him and will continue to be so until the final deter-

mination of this suit; and that plaintiff has so informed all the Departmental officials above named. That it is plaintiff's intention to persist in such daily attendance, requests and insistence upon his right to be retained on active duty as an Attorney in the United States Department of Agriculture.

25. That defendant has wrongfully excluded and separated plaintiff from active duty in his position and in the Department of Agriculture and will continue to do so, and do so permanently, unless otherwise ordered by this Court.

26. That plaintiff has no plain, adequate and complete remedy at law, and has no plain, adequate and complete remedy of any sort save and except at the hands of this Court.

WHEREFORE, the premises considered, the plaintiff prays:

1. That process issue from this Court commanding the defendant to answer this suit and amended complaint.

2. That preliminary mandatory injunction issue directing the defendant to restore plaintiff to active duty forthwith.

3. That final mandatory injunction issue directing the defendant to restore plaintiff to duty in possession of and in accordance with all the rights, privileges, and benefits that plaintiff enjoyed at the time of the wrongful separation from active duty, and to permit plaintiff to receive all the rights, benefits, and privileges that would normally flow from a continuity of service on active duty from the time of the wrongful separation up to and including the final order of this Court.

4. That the Court render declaratory judgment in favor of the plaintiff, declaring:

23

I

That the defendant's notice of separation dated May 29, 1947, purporting to separate plaintiff from active duty, and from his position of Attorney P-3 and performance of his functions thereunder, was unlawful, illegal and void under the laws of the United States.

II

That plaintiff is entitled to preference in retention and to retention in active duty in such position and in Government employment.

III

That plaintiff has the right to be retained in his position in preference to all other competing employees and before any additional employee from any other source may be appointed for such position. That such right to retention is secured to plaintiff under Section 12 of the Veterans' Preference Act of 1944 (5 U.S.C.A. 861). That the words "in preference to all other competing employees" are used in Section 12 of the Act in the ordinary and usual sense of in preference to all other employees who are capable of performing the work performed by plaintiff in such position, or who have been assigned or may be assigned to perform all or any part of such work in the place and stead of plaintiff, and this regardless of the formal designation of any such other employees as in grades P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, or other grades. Such other employees, regardless of grade, must be held to be in the posture of striving and competing with plaintiff for the right to do the same work the plaintiff has been doing and seeks to continue to do. All such other competing employees must necessarily yield in this matter to the mandatory preference to be retained in his position that is secured to plaintiff by Congress in this statute.

IV

That plaintiff has acquired competitive status as a Government employee by probational appointment through an open competitive examination appropriate for the position occupied, by satisfactory completion of his probational period of one year under said appointment, and by the
24 granting to plaintiff of within-grade salary advancements, potential retirement benefits, and other re-

ciprocal privileges and obligations incompatible with the rights of any other than an employee of competitive status occupying a permanent position. The Court holds plaintiff to be such an employee.

V

That, even had the plaintiff not acquired competitive status, the plaintiff's Veterans' Preference right to retention in his position is not and cannot be lawfully limited to the duration of the war and six months thereafter, nor be limited to any definite period of time whatsoever. Such right to retention must be held to continue indefinitely, subject only to modification by reason of any failure on plaintiff's part to maintain the efficiency ratings prescribed by the Veterans' Preference Act of 1944, or of plaintiff's attainment of retirement age, or of the duly established existence of any other statutory grounds that may authorize plaintiff's resignation, separation, or removal; and such Veterans' Preference right to retention may not otherwise be cut off, cut down, shortened, nor in any other manner be interfered with by any administrative policy nor by any administrative action whatever.

VI

That plaintiff, as an honorably discharged soldier whose record is rated good or better, has the right which is mandatory upon this defendant, his agents and employees, that plaintiff shall not be discharged, dropped, or reduced in rank or salary in the event of any reduction in force. Such right is secured to plaintiff by the Act of August 23, 1912, c. 350, Sec. 4, 37 Stat. 413, as amended by the Act of February 28, 1916, c. 37, Sec. 1, 39 Stat. 15 (Title 5 U.S.C.A. 648), and by Section 18 of the Veterans' Preference Act of 1944, 58 Stat. 391 (Title 5 U.S.C.A. 867).

VII

That the memorandum dated May 1, 1947 over the signature of W. Carroll Hunter, Solicitor, relating to "Subject: Status of Attorney Positions under New Civil Service Rules", and all purported retention and separation registers or lists, and all acts of defendant, his agents and employees, thereunder or pursuant thereto, were and are unlawful, unauthorized and void under the laws of the United States insofar as the retention rights of the plaintiff, a Veterans' Preference employee whose efficiency rating is good or better, have been or may be adversely affected thereby. The defendant, his agents and employees, have no lawful authority to make any order, nor to adopt any regulation or administrative policy, nor to take any administrative action whatsoever which does not accord plaintiff the full measure of preference provided by the Veterans' Preference Act of 1944 and other existing laws, Executive Orders, and Civil Service Rules.

VIII

That the plaintiff's Veterans' Preference right to retention in employment may not lawfully be restricted to any area less than department-wide nor to any formal grade P-3 position, Group B-1, nor other artificial limits. That plaintiff's Veterans' Preference right to retention must necessarily be extended to any position the work and duties of which the plaintiff has satisfactorily performed with an efficiency rating of good or better, and to any departmental position, regardless of its categorical level or alphabetical designation, the work and duties of which may reasonably be deemed within the capabilities of an employee of plaintiff's experience and training. That the mandatory requirements of the Veterans' Preference Act of 1944 are that a Veterans' Preference employee must be given any available work for which he is reasonably adapted; and where his efficiency rating in a position is good or better,

such Veterans' Preference employee must be retained in such position in preference to any other employee or employees whatsoever, and so retained before any of the work, functions or duties of such position may be assigned or parceled out to any other employee or employees. Under and by virtue of the provisions of this Act of 1944, so long as the efficiency rating of a Veterans' Preference employee is good or better as the occupant of a position, so long does he retain such position against all the world.

26 5. That, because of the unlawful acts of the defendant, the plaintiff have and recover against the defendant the costs of this action.

6. That the plaintiff may have such other and further relief as to the Court may appear equitable and just.

ROBERT D. ELDER,
Plaintiff.

C. L. DAWSON
Attorney for the Plaintiff
917 15th Street, N.W.,
Washington, D. C.

[Notarial Certificate omitted.]

27 Filed Jun 24 1947

Plaintiff's Exhibit "D".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

May 1, 1947

To: All Attorneys, Office of the Solicitor
From: Solicitor
Subject: Status of Attorney Positions under New Civil Service Rules

By Executive Order 9830 of February 24, 1947, the Civil Service rules have been amended, effective May 1, 1947.

Prior to May 1 there existed three possible categories in which attorney appointees were classified: (1) attorneys with competitive status acquired either through (a) classification under the Ramspeck Act and Executive Order 8743, (b) transfer from a probational or permanent appointment in attorney or other than attorney positions, or (c) reinstatement after a break in service; (2) war service appointments which were effected under the War Service Regulations, for the most part those appointed on or after March 16, 1942 and who did not enjoy permanent status in any prior Federal employment; and (3) attorneys serving under temporary indefinite appointments under the temporary Civil Service Regulations which were in effect from March 6, 1946 to April 30, 1947. The amended rules, although they provide that appointments to attorney positions are to be made without examination by the Civil Service Commission under Schedule A, contain a provision that whenever any attorney position is occupied by a person having competitive civil service status, he shall be separated from such position only in accordance with the Civil Service Rules and Regulations, as amended.

Civil Service Departmental Circular No. 497, Supplement 2, dated April 15, 1947, withdrew the authority for the continued employment of attorneys under war service or temporary indefinite appointments beyond April 30, 1947. In order to continue their employment, therefore, it has been necessary to convert all war service and temporary indefinite attorney appointments to appointments under Schedule A, effective May 1, 1947. Those concerned will receive fanfolds effecting the conversion. A limitation is being placed on all conversions limiting former war service and temporary indefinite attorney appointments to the duration of the war and six months thereafter which is, in effect, a continuation of virtually the same tenure previously enjoyed. If it is found possible to recruit new attorney personnel, all such appointments during the present war period will also carry that limitation. No change will be made

in the appointments of attorneys serving with a competitive Civil Service status.

In any future reductions-in-force of attorney personnel which it may become necessary to effect, all attorneys who have Civil Service status will be considered in Retention Group A, as they have been, and those former war service and temporary appointees whose appointments have been converted incident to the reestablishment of Schedule A will be considered in Retention Group B, as they were previously.

The definitions of the three retention groups in the order of retention preference are given below:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more.

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2(b) of the Civil Service Retirement Act, as amended.

Within each group, except Group A, there are four subgroups as follows:

(1) With veteran preference with efficiency rating of "Good" or better.

(2) Without veteran preference with efficiency rating of "Good" or better.

(3) With veteran preference where efficiency rating is less than "Good".

(4) Without veteran preference where efficiency rating is less than "Good".

Under Group A, the highest retention group, there are five sub-groups composed of the four sub-groups listed above and A-1 Plus. This latter category is applicable to veterans following return from military service and
29 to certain employees who transferred to other agencies with reemployment rights under Executive Orders 8973 and 9067 prior to September 27, 1942, during the one year period immediately following their return to duty. A-1 Plus is the highest sub-group for retention purposes.

In the event there are any questions regarding the status of any attorneys in this office, we shall be pleased to attempt to furnish additional information to the individuals concerned upon receipt of their requests.

W. CARROLL HUNTER.

30 Filed Jun 24 1948

Plaintiff's Exhibit "E".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

October 24, 1945

MEMORANDUM NO. 1131

Reemployment and Retention of Veterans

I wish to call your attention to and wholeheartedly endorse the policy of the Department on reemployment of veterans as stated in General Departmental Circular No. 53 issued October 9, 1944.

Reductions in force may result from reorganization of the Department's activities or due to lack of work or funds.

Veterans have legal rights for retention in the service under those conditions. The obligation to continue them in employment status is Department-wide where there are positions available which they can fill. It is the policy of the Department to observe the spirit and intent as well as the letter of the law dealing with veterans' rights.

The Director of Personnel, on the basis of the legal requirements and regulations of the Civil Service Commission, will issue procedural instructions for giving force and effect to these requirements.

Each administrator and supervisor is personally responsible for seeing that the obligations for reemployment and retention of veterans are adequately met.

CLINTON P. ANDERSON,
Secretary.

* * * * * * * * * *

31 Filed Aug 15 1947

Defendant's Motion for Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Now comes the defendant, and upon the complaint on file in this Court and upon the annexed affidavits of Lawson A. Moyer, dated August 5, 1947, and W. Edward Bawcombe, dated July 25, 1947, respectfully moves the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there are no genuine issues as to any material facts and defendant is entitled to such judgment as a matter of law and for such other and further relief as to the Court may seem just and proper.

HERBERT A. BERGSON,
Acting Assistant Attorney General.

GEORGE MORRIS FAY, by D.B.M.
United States Attorney.

Of Counsel:

JOSEPH M. FRIEDMAN,
Special Assistant to the Attorney General.

JULIUS FRIEDENSON,
Attorney, United States Civil Service Commission.

32 Filed Aug 15 1947

Affidavit in Support of Defendant's Motion for Summary Judgment.

CITY OF WASHINGTON,
District of Columbia, ss:

Lawson A. Moyer, being duly sworn, deposes and says:

I am the Executive Director and Chief Examiner of the United States Civil Service Commission. This affidavit is submitted in support of a Motion for Summary Judgment made by the defendant in the above-entitled action.

On an undated communication received by the United States Civil Service Commission on June 6, 1947 the plaintiff, Robert D. Elder, filed with the Civil Service Commission an appeal from his separation from the position of attorney, P-3, Department of Agriculture, Office of the Solicitor. An investigation of the facts was conducted by the Civil Service Commission, as a result of which it was found by the Commission that the plaintiff's separation was effected in full compliance with Section 12 of the Veterans' Preference Act of June 27, 1944 (58 Stat. 387) and
33 the Retention Preference Regulations promulgated by the Civil Service Commission pursuant thereto (12 F. R. 2849).

Plaintiff was accordingly notified by the Civil Service Commission on July 14, 1947 that his appeal was denied. A copy of this notice is attached hereto and made a part hereof.

LAWSON A. MOYER.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 5 day of Aug., 1947.

H. E. SENEDER,
Notary Public.

(Seal)

My Commission expires Jan. 1, 1951.

Letter.

34 UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

July 14, 1947

Mr. Robert D. Elder
4233 32nd Road South
Arlington, Virginia

Dear Mr. Elder:

The investigation of your appeal from separation by reduction in force from your position in the Office of the Solicitor, Department of Agriculture, has been completed.

Information obtained disclosed that you were properly reached for reduction in force action and received due written notice of your proposed separation. Since you are in a position which is excepted from the Civil Service Act and Rules, it is not mandatory that you be offered reassignment to a continuing position under Section 9 of the Retention Preference Regulations.

In view of the fact that your rights under the Retention Preference Regulations have been observed in the action

taken in your case, you are advised that your appeal is denied.

Very truly yours,

JOHN A. OVERHOLT, *Chief,*
Efficiency Ratings,
Administration Section,
Personnel Classification Division.

* * * * * * * * * * *

35 — Filed Aug 15 1947

Affidavit in Support of Defendant's Motion for Summary Judgment.

CITY OF WASHINGTON,
District of Columbia, ss:

W. Edward Bawcombe, being duly sworn, deposes and says:

I am the Executive Assistant to the Solicitor, Office of the Solicitor, United States Department of Agriculture. This affidavit is submitted in support of a motion for summary judgment made by the defendant in the above entitled action.

On February 16, 1942, the President, by virtue of the authority vested in him by section 2 of the Civil Service Act, issued Executive Order No. 9063 (7 F. R. 1075) authorizing the Civil Service Commission to adopt and prescribe such special procedures and regulations relating to the recruitment, placement, and changes in status of personnel in Federal service as it determined to be necessary in order that there would be no delay during the war emergency in filling positions in the Federal service with qualified persons. Said Executive Order further provided that the procedures and regulations thus adopted and prescribed were to be binding with respect to all positions affected thereby which were subject to the provisions of the Civil Service

36 Act and rules. The second paragraph of Executive

Order No. 9063 stated that persons appointed solely by reason of any special procedures adopted under authority of said order to positions subject to the provisions of the Civil Service Act and rules were not thereby to acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, might be retained for the duration of the war and for six months thereafter.

Pursuant to Executive Order No. 9063, the Civil Service Commission prepared and adopted the War Service Regulations effective March 16, 1942 (Title 5, CFR, Cum. Supp., Chap. 1, Part 18).

Under date of July 15, 1943, the Office of the Solicitor, United States Department of Agriculture, was authorized by the Legal Examining Section of the Civil Service Commission to appoint the plaintiff, Robert D. Elder, to a War Service Indefinite Appointment pursuant to section 7, Regulation 1 of the regulations of the Board of Legal Examiners, which regulations were adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July 1, 1943. Section 7, Regulation 1, provided that:

"All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the
37 satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby acquire a classified Civil Service status."

Pursuant to the aforesaid authority the plaintiff was appointed on August 2, 1943, by a war service appointment, to the position of Associate Attorney, Office of the Solicitor, United States Department of Agriculture, Washington, D. C., a position subject to the aforesaid War Service Regulations.

On February 4, 1946, the President, by virtue of the authority vested in him by sections 2 and 3 of the Civil Service Act (22 Stat. 403), section 1753 of the Revised Statutes, and section 3(b) of the Civil Service Retirement Act, as amended (5 U.S.C. Supp. V. 693), issued Executive Order No. 9691 (11 F. R. 1381) providing for the termination of the War Service Regulations and authorizing the Civil Service Commission to issue temporary regulations to cover the transitional period between the expiration of the War Service Regulations and the issuance of revised Civil Service regulations. Temporary Civil Service Regulations were issued by the Civil Service Commission pursuant to the authority of the aforesaid Executive Order, effective March 7, 1946, said Temporary Civil Service Regulations superseding the War Service Regulations. The Temporary Civil Service Regulations did not require or result in any change in the nature of the appointment held by the plaintiff or in the tenure thereof.

38 Effective May 1, 1947, the President, under authority of the Constitution, section 1753 of the Revised Statutes, and the Civil Service Act of January 16, 1883 (22 Stat. 403), issued Executive Order 9830 (12 F. R. 1259) promulgating revised Civil Service Rules which specifically provide, among other things, as follows:

1. That "the words 'competitive service' shall have the same meaning as the words 'classified service' or 'classified (competitive) service' or 'classified civil service' as defined in existing statutes and Executive orders. The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom under statute or Executive order . . . " (Rule 1, 12 F. R. 1262).

2. That all attorney positions in the entire executive civil service are excepted from the competitive service and are included in Schedule A of the Civil Service Rules. (Rule VI, 12 F. R. 1263).

Pursuant to Executive Order No. 9830 and section 12 of the Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. Supp. V, 861), the Civil Service Commission issued Retention Preference Regulations for Use in Reductions in Force, effective May 1, 1947 (12 F. R. 2849). The regulations specifically provide, among other things, as follows:

1. That for the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in com-
39 petitive retention groups as follows:

Group A: With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter.

Subgroup B-1: Group B employees with veteran's preference unless efficiency rating is less than "Good". (Sec. 20.3, Part 20).

2. Employees appointed after March 16, 1942, are in Group B unless (1) they are currently holding appointments definitely limited to one year or less or (2) they are occupying positions excepted from the Civil Service Act and rules and not limited in duration. (Sec. 20.4 *id*).

3. Within each competitive level, separation actions must be taken with respect to all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B, such action must be taken concerning all employees with a lower number of retention credits before an employee with a higher number of retention credits is reached. (Sec. 20.8 *id*).

40 In accordance with the provisions of the aforesaid Civil Service Rule VI, and in view of the fact that as of May 1, 1947, the Civil Service Commission withdrew authority to continue war service appointments as such, (C. S. C. Deptl. Circ. No. 497, Supp. No. 2), the appoint-

ment of the plaintiff was converted, effective May 1, 1947, to "Excepted Appointment (Schedule A-1-4)" with no change in the tenure of the appointment and the appointment was continued specifically "limited to the duration of the war and six months thereafter".

Due to a lack of funds it became necessary in the latter part of May 1947 for the aforesaid Office of the Solicitor to initiate a reduction in force action among its employees. Due to the nature and tenure of the plaintiff's appointment he was classified in retention subgroup B-1 on the retention list prepared for use in the aforesaid reduction in force action.

On May 29, 1947, the aforesaid Solicitor gave written notice to the plaintiff that:

"A reduction in force brought about by lack of funds necessitates your being separated, effective on or after June 30, c.o.b. Your last day of active duty in your present position will be June 6, 1947."

The notice further stated that following the last day of active duty the remainder of the thirty days notice period would consist of accrued annual leave and nonpay status after such leave, and called attention to the plaintiff's right of appeal to the Civil Service Commission and the other rights and privileges which he had. Similar notices were given to all employees in the aforesaid office who
41 were in the same retention subgroup, competitive level, and competitive area with the plaintiff and in lower retention subgroups in said competitive level and area. The aforesaid notice, like similar notices received by other employees on the same date, was intended to be, and was treated as, definite notice, of the minimum thirty days required by the Civil Service Commission, that the recipient's appointment would be terminated in the current reduction in force. On and after June 30, 1947, the plaintiff had no right to retention in his present position unless (a) the notice was revoked, (b) the effective date of the separation pursuant to such notice was temporarily delayed

or (c) he was reappointed thereto following consummation of the separation action.

The reduction in force action in the aforesaid Office of the Solicitor was accelerated somewhat by the necessity of timing employee separations so that they would fall within the fiscal year ending June 30, 1947, and thereby permit lump sum payments for accrued and accumulated annual leave to be made out of the appropriation for that fiscal year rather than out of the 1948 fiscal year appropriation. On June 27, 1947, Congress enacted the Second Urgent Deficiency Appropriation Act, 1947, (Pub. Law No. 122, 80th Congress), which provides, in section 103, that when employees are separated from the service during July 1947 by reason of a reduction in force and have been given notice of such separation during the fiscal year 1947, lump sum payments for accumulated leave may be charged against unobligated balances of the 1947 appropriations from which the employees were paid. In view there-
42 of, and inasmuch as the amount of funds available for the aforesaid Office of the Solicitor for the fiscal year ending June 30, 1948, had not been finally determined by enactment of the Department of Agriculture Appropriation Act for 1948, the aforesaid Solicitor on June 30, 1947, notified the plaintiff, and other employees who received notices on May 29, 1947, in writing, that:

"Pending approval of the 1948 appropriation act for this Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation, so that we may then inform you of the definite action which will be taken with respect to your employment in this office."

The aforesaid notice of June 30, 1947, was given for the sole purpose of benefiting the employees receiving such notices by delaying final action upon their separations so that if sufficient funds had been provided by Congress, such employment could have been continued without prejudice to their employment status.

Since such funds were not provided, pursuant to the notice of May 29, 1947, the appointment of the plaintiff was terminated effective June 30, 1947, and the plaintiff is being paid a lump sum payment for the accumulated and accrued annual leave then to his credit. As of the same date the appointments of all other employees of the aforesaid Office of the Solicitor who were in the same retention subgroup as the plaintiff, or in lower retention sub-
43 groups, and in the same competitive level and competitive area as plaintiff were terminated.

Attached hereto and made a part hereof are certified true copies of the notice of appointment effective August 2, 1943, the notice of conversion to excepted appointment (Schedule A-1-4) effective May 1, 1947, the reduction in force notice of May 29, 1947, the notice of delay of final action on separation notice of June 30, 1947, and notice of separation effective June 30, 1947, furnished the plaintiff by the Office of the Solicitor.

W. Edward Bawcombe.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 25th day of July, 1947.

L. U. Sampson,
Notary Public.

My commission expires July 31, 1947.

* * * * * * * * * * *

45 Washington, D. C.

July 21, 1943

(Seal—U. S. Department
of Agriculture)

Name Mr. Robert D. Elder
Nature of Action: War Service Appointment, Subject to Return of an Employee from Service Under E. O. 9067

Position Associate Attorney
Grade & Salary P-3-144, $3,200 per annum (Bureau No. 1690)
Bureau Office of the Solicitor
Branch Forestry, Lands and Labor Division
Headquarters Washington, D. C.
Departmental or Field Departmental

Effective Date: August 2, 1943
Remarks:

This action is subject to the provisions of paragraphs listed on the other side of this notification.

By direction of the Secretary of Agriculture.

Respectfully,

Perforated T. Roy Reid 7-16-43
Director of Personnel.

THIS ACTION IS VOID UNLESS PERFORATED

46 IMPORTANT

(a) Under this appointment you are subject to the provisions of the Civil Service Retirement Act as amended. Through June 30, 1942, 3½% will be deducted from your basic salary for deposit to your credit in the Retirement Fund. On and after July 1, 1942, 5% will be deducted from your basic salary for deposit to your credit in the Retirement Fund.

(b) This appointment is subject to taking the Oath of Office (Standard Form No. 8) which should be submitted to the Chief of your Bureau or Office.

(c) Civil Service Commission Form 3464a shall be prepared in duplicate and submitted to the Department Office of Personnel through the Chief of your Bureau or Office.

(d) This appointment is for the duration of the work.

(e) This appointment is for the duration of the work, but not beyond December 31 of the calendar year in which the appointment is effective.

(f) This appointment is for such period of time as your services may be required and funds are available but not to extend beyond the date of expiration of the emergency appropriation from which your compensation is paid.

(g) This appointment is for such time as your services may be required and funds are available for Civilian Conservation Corps work.

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47 OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

May 1, 1947

Name: Mr. Robert D. Elder
Nature of Action: Conversion to Excepted Appointment (Schedule A-1-4)

Position Attorney P-3
Grade, Salary & Position No. P-970-3-151, $4525.80 p. a. (Bureau No. 1061)
Bureau Office of the Solicitor
Branch or Div. Production & Subsistence
Headquarters Washington, D. C.
Departmental or Field Departmental

Effective Date: May 1, 1947
Remarks: This appointment is limited to the duration of the war and six months thereafter.

/s/ W. Carroll Hunter,
Name of Employment Officer.

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48 Form OP-16
(Revised May 22, 1947)

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

May 29, 1947

Retention Subgroup of Employee B-1

To: Robert D. Elder
From: Solicitor
Subject: Notice To Employee Affected By Reduction In Force

A reduction in force brought about by lack of funds necessitates your being separated, effective on or after June 30, 1947 c.o.b. Your last day of active duty in your present position will be June 6, 1947. You have the following rights and privileges:

1. If you are an employee in retention subgroup A-3 or A-4 or in retention group B or C, you are entitled to 30 days' minimum notice of reduction in force action. If you are an employee in retention subgroup A-1 or A-2 you are entitled under normal circumstances to 1 year's notice of separation. If you are an employee in subgroup A-1 or A-2 and you are given less than 1 year's notice, such notice is based on a waiver granted by the Civil Service Commission due to lack of funds. If you are an employee in subgroup A-1 or A-2 occupying a position subject to the Civil Service Act and you are given less than 1 year's notice, you are entitled to the same consideration for placement in other positions as you would have if given the 1 year's notice of separation.

2. After your last day of active duty the remainder of the notice period will consist of your accrued annual leave and nonpay status thereafter. If you have any unused annual leave still to your credit as of the effective date of

your separation you will be given a lump-sum payment for this amount.

3. You may examine Personnel Circular No. 94 which contains reduction-in-force procedures as they apply in the Department, records which form the basis of this reduction in force, and the list on which your name appears. These are available Personnel Section, Room 2103 South Building.

4. You may appeal to the Civil Service Commission if you consider that this proposed action violates your rights or if you are denied the right to examine records, regulations and/or reduction-in-force lists. You have 10 days from receipt of this notice to appeal to the appropriate Civil Service Office which is located at 7th and F Streets, N.W., Washington, D. C.

49 5. Your personnel representative, Mrs. Pauline C. Wood, will be glad to give you information regarding the procedure for exercising any restoration or reemployment rights which you may have in another Federal agency, the channels through which you may apply for other government employment and the procedure for securing a refund of retirement deductions provided that you are eligible to apply for such refund. Upon request, you will be issued a "Release From Employment" to serve as your statement of availability when seeking other Federal employment.

6. You are entitled to further consideration for placement in other positions. Appropriate action is being recommended to assure this consideration.*

/s/ W. CARROLL HUNTER,
Employment Officer.

Note: This notice may be reconsidered based on the availability of appropriations.

* Applicable only to employees in retention Group A and subgroup B-1 occupying positions subject to the Civil Service Act.

50 UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

June 30, 1947

To: Mr. Robert D. Elder
From: Solicitor
Subject: Delay of Final Action on Separation Notice

As indicated on the reduction-in-force notice furnished you, dated May 29, 1947, your separation may be effective on or after June 30, 1947.

Pending approval of the 1948 Appropriation Act for this Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation, so that we may then inform you of the definite action which will be taken with respect to your employment in this office.

W. CARROLL HUNTER.

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51 OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

July 25, 1947

Name: Mr. Robert D. Elder
Nature of Action: Reduction in force

Position Attorney P-3
Grade, Salary & Position No. P-970-3-151, $4,525.80 p. a.
(Bureau No. 1061)
Bureau Office of the Solicitor
Branch or Div. Production and Subsistence Division
Headquarters Washington, D. C.
Departmental or Field Departmental

Effective Date: June 30, 1947 c.o.b.
Remarks: Employee to be paid for 584 hours annual leave which would have carried him to October 13, 1947 c.o.b. Lack of funds.

There is no other position for which this employee has reassignment rights which is occupied by another employee subject to displacement for which this employee is qualified and willing to accept.

W. CARROLL HUNTER,
Name of Employment Officer.

* * * * * * * * * *

52 Filed Sep 5 1947

Affidavit of Robert D. Elder in Opposition to Defendant's Motion for Summary Judgment.

DISTRICT OF COLUMBIA, *ss:*

Robert D. Elder, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action and signed and verified the Complaint and the Amended Complaint therein. Prior to September, 1942, plaintiff was informed by the Denver office of the United States Civil Service Commission that the Commission would soon be giving a competitive written examination throughout the country for positions of Attorney in the Government service. Plaintiff thereupon applied to the Commission for such competitive written examination and filed with his application a certified copy of his honorable discharge dated December 9, 1918 as Captain, Infantry, United States Army. The Commission later notified him that the examination would be held in West Denver High School on a specified day in September, 1942, at which time and place the plaintiff attended, and took and passed said open competitive written examination, in which the entire day of morning and afternoon sessions was taken up. Plaintiff received an eligible rating as the result of such open competitive written examination.

53 A few days after May 29, 1947 the plaintiff examined and made penciled memoranda of the names and of the assigned "retention Subgroups" as assigned to Attorneys, Grade P-3, set out in the official retention register

of employees of the Washington office of the Office of the Solicitor, United States Department of Agriculture. Under retention Subgroup A-2 therein appeared the names of five women and three men, each one of whom was then and is now known by plaintiff to be employed on active duty for several years past in a position of Attorney, Grade P-3, in said Washington office of the Office of the Solicitor. Each one of said eight Attorneys, Grade P-3, thus assigned by Defendant to retention Subgroup A-2, is carried on the records of the Office of the Solicitor as (1) "Without veteran preference". (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service.

Each of said eight Attorneys, Grade P-3, thus in retention Subgroup A-2, has been retained in his or her position of Attorney, Grade P-3 at all times since June 6, 1947 and continues to be employed on active duty in said Washington office of the Office of the Solicitor as of September 5, 1947, the date of this Affidavit. Under retention Subgroup B-1, in such official retention register appeared the names of three men, including plaintiff, each one of whom received an identical separation notice May 29, 1947, and has been finally and completely separated in the same manner as plaintiff. Like plaintiff, each one is carried on the records of the Office of the Solicitor as (1) "With veteran preference with efficiency rating of 'Good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter.

ROBERT D. ELDER.

Subscribed and sworn to before me, a Deputy Clerk in and for the District of Columbia, this 5 day of Sept. 1947.

CHARLES E. STEWART,
Clerk.
By PAUL A. ROSES,
Deputy Clerk.

54 Filed Mar 5 1948

Order Granting Leave to File Amended and Supplemental Complaint.

Upon application of the plaintiff for leave to file an amended and supplemental complaint and no objection having been interposed by defendant, it is, by the Court this 4th day of March, 1948,

ORDERED, that the plaintiff may file and serve an amended and supplemental complaint in this action on or before the 10th day of March, 1948, and

That the defendant may, if he so desires, withdraw his motion for a summary judgment heretofore filed and directed to the original complaint.

BEN MOORE,
Justice.

Approved as to form:

ROBERT D. ELDER,
Plaintiff.

JOSEPH M. FRIEDMAN,
Counsel for Defendant.

55 Filed Mar 8 1948

Amended and Supplemental Complaint.

Suit for a Temporary and Permanent Injunction to Restrain the Defendant From Separating the Plaintiff, an Honorably Discharged Veteran of the United States, From a Position as Attorney Under the Jurisdiction of the Defendant, for a Mandatory Injunction Restoring Plaintiff's Employment and Employment Status, for a Declaratory Judgment, and for Such Other and Further Relief as to the Court May Appear Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

Plaintiff realleges Paragraphs 1 to 17 inclusive of the original complaint filed herein June 5, 1947, together with all exhibits and prayers for relief, and also realleges Paragraphs 18 to 26 inclusive of the first amended complaint filed herein June 24, 1947, together with all exhibits and prayers for relief. Plaintiff further alleges:

27. Prior to June, 1942, and during all times referred to herein, this plaintiff has been an honorably discharged soldier whose record in said Department of Agriculture is rated good or very good, and is an established preference eligible possessed of the rights granted under the Act of August 23, 1912 [c. 350, Sec. 4, 37 Stat. 413, as amended by the Act of February 28, 1916, c. 37, Sec. 1, 39 Stat.
56 15; 5 U.S.C.A. 648]. All the aforesaid rights of plaintiff have been violated by the conduct of defendant complained of in this action.

28. During all times since June 27, 1944, this plaintiff has been an ex-serviceman who has served on active duty in the infantry branch of the armed forces of the United States during World War One of 1917, has been separated therefrom under honorable conditions, and has been an established preference eligible possessed of the rights granted under each and every section of the Veterans' Preference Act of June 27, 1944, [c. 287, 58 Stat. 387 to 391 inclusive, 5 U.S.C.A. 851 to 869 inclusive] and more especially has been possessed of the rights granted under Sections 2, 7, 8, 9, 12, 13, 14, 15, and 18 of said Act of 1944 [5 U.S.C.A. 851, 856, 857, 858, 861, 862, 863, 864, and 867]. During all times since August 2, 1943, this plaintiff has also been a preference employee, whose efficiency ratings have been and are "good or better", possessed of the rights granted under Section 12 of the Veterans' Preference Act of 1944 [5 U.S.C.A. 861]. All the aforesaid rights have been violated by the conduct of defendant complained of in this action.

29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Rob-

ert D. Elder, from employment and active duty in his position of Attorney, Grade P-3, in the Washington office of the Office of the Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment, in wrongful preference to plaintiff, other competing employees, the same being non-veterans' preference Attorneys, Grade P-3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency rating of "very good", as well as assuming to perform functions and duties which plaintiff was and is capable of performing.

57

30. The mimeographed notice from the Solicitor dated May 29, 1947 (Plaintiff's Exhibit "A", Complaint), at that time informed plaintiff Elder that "lack of funds" necessitated his separation from his position effective June 30, 1947, and that his last day of active duty therein would be June 6, 1947. Notices to the same effect were at the same time delivered to many other Attorneys who were carried on the retention register of said Washington office in the so-called sub-groups A-2, B-1, and B-2. On July 3, 1947, the plaintiff and other Attorneys received from the Solicitor another mimeographed notice dated June 30, 1947, informing each of them that: "Pending approval of the 1948 Appropriation Act for the Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation, so that we may then inform you of the definite action which will be taken with respect to your employment in this office." A copy of said letter of June 30, 1947, is hereto attached, marked Plaintiff's Exhibit "F". On July 25, 1947, the plaintiff received a typewritten letter dated July 24, 1947, from the Solicitor which informed him *inter alia:* "I regret to inform you that it will not be possible to rescind the separation notice issued to you. Your separation by reduction-in-force will, therefore, be effective at the close of business June 30, 1947 * * *. I wish to tell you

again how much I regret the necessity for this action and to wish you every success for your future. (Signed W. Carroll Hunter." A copy of said letter dated July 24, 1947, is hereto attached, marked Plaintiff's Exhibit "G". On July 31, 1947, the plaintiff received another short
58 transmittal letter from the Solicitor dated July 30, 1947, enclosing the formal notice dated July 25, 1947, of plaintiff's separation, which stated *inter alia*, "Effective date: June 30, 1947 c.o.b. Remarks—: Lack of funds." A copy of said letter dated July 30, 1947, is hereto attached, marked Plaintiff's Exhibit "H", and a copy of said notice dated July 25, 1947, is hereto attached, marked Plaintiff's Exhibit "I".

31. Soon thereafter the Solicitor put back to work and employment on active duty all the non-veterans' preference Attorneys on the "retention register" in sub-group A-2, together with a considerable number of the non-veterans' preference Attorneys in sub-group B-2, who had received such notices of separation. But neither plaintiff nor any other veterans' preference eligible among the Attorneys in the supposedly superior sub-group B-1, regardless of his professional grade or efficiency rating, has ever been put back to work or given any employment since June 6, 1947, in the Office of the Solicitor, United States Department of Agriculture.

32. Among the Attorneys in the relatively inferior retention sub-group B-2, whom the Solicitor thus put back to work and continued in employment, were the following persons: (1) Virginia Merrill, (2) Lotus Threkelson, (3) Helen Lutzen, (4) Marion Poole, (5) Neil Johnson, and (6) Russell Johnston, each of whom has been steadily employed as an Attorney, Grade P-3, on active duty with pay in said Washington office of the Office of the Solicitor during the several months last past, and each of whom is still steadily employed therein, although plaintiff is informed and believes that Congress has appropriated no ad-
59 ditional funds available for such Attorney salaries

since May 29, 1947. Prior to June 6, 1947, each of said six Attorneys in such inferior sub-group B-2 was on duty in said Washington office under an appointment subject to the same ostensible time limitation as that of plaintiff, to-wit: "for the duration of the war and for six months thereafter." When the retention register of the Office of the Solicitor was examined by this plaintiff between the dates May 29, 1947, and June 6, 1947, the name of the aforesaid Virginia Merrill, among others, appeared therein as an Attorney, Grade P-3, in sub-group B-2, whereas the name of this plaintiff appeared therein as an Attorney, Grade P-3, among other veterans' preference Attorneys in the supposedly superior sub-group B-1 set up by the Civil Service Retention Preference Regulations. None of said six Attorneys in said inferior sub-group B-2 has ever been accorded a permanent or classified (competitive) civil service status. None of said six Attorneys in sub-group B-2 has ever served "on active duty in any branch of the armed forces of the United States during any war . . . " (Veterans' Preference Act of 1944, 58 Stat. 390, 5 U.S.C.A. 851, 861). None of said six Attorneys has ever been an "honorably discharged soldier or sailor whose record in said department is rated good . . . " (Act of August 23, 1912, 37 Stat. 413, 5 U.S.C.A. 648). None of said six Attorneys is now or ever has been a veterans' preference eligible, nor a veterans' preference employee, nor an honorably discharged soldier or sailor, nor entitled to any right, privilege, or preference as such.

60 33. The employment and continuation in employment by defendant of said six Attorneys, Grade P-3, sub-group B-2, while defendant excluded plaintiff therefrom, was itself in violation and attempted evasion of this plaintiff's superior rights to continued employment under Sections 2 and 12 of the Veterans' Preference Act of 1944 and under Section 4 of said Act of August 23, 1912; and was also in disregard of that portion of such rights accorded by the Civil Service Retention Preference Regula-

tions [Part 20, pp. 2849-2853, Vol. 12, No. 86, Fed. Reg. of May 1, 1947], pursuant to which defendant has asserted that he conducted the alleged separation of this plaintiff, an Attorney, Grade P-3, in the superior sub-group B-1.

34. In addition to the above Attorneys, Grade P-3, in sub-group B-2, the defendant has concurrently continued in employment on active duty a considerable number of other Attorneys in Grade P-4 and higher, who are non-veterans in said sub-group B-2 and none of whom has ever been accorded permanent or classified (competitive) civil service status. One such Attorney, who is a non-veteran serving under an indefinite war-service appointment in sub-group B-2, was on May 29, 1947, and thereafter, unlawfully withheld from the prescribed operation of the Civil Service Retention Preference Regulations and has never been the recipient of a separation notice. Each of the aforesaid acts was likewise in violation of plaintiff's statutory rights and the regulations.

35. The employment and continuation in employment by defendant of the non-veteran Attorneys above-referred to, including the aforesaid six Attorneys, Grade P-3,
61 sub-group B-2, has required and requires a far greater expenditure of funds, many times over, than would result from the employment of plaintiff, one Attorney, Grade P-3, in the superior retention sub-group B-1. The reason, "lack of funds," asserted by defendant to necessitate plaintiff's concurrent exclusion from such employment, does not exist and is without justification; and this plaintiff has thereby been deprived of his aforesaid statutory rights to continuing employment without sufficient or legal cause, and without any cause whatsoever, in further violation of the requirements of section 14, Veterans' Preference Act of 1944 (5 U.S.C.A. 864), in respect of the notification and establishment of such cause and the reasons therefor.

36. The plaintiff's unsuccessful efforts to obtain rescission of his notice of separation and purported separation

by oral and written appeal to the defendant's Solicitor, followed by written appeal to the Secretary of Agriculture, are alleged in the amended complaint filed June 24, 1947. The plaintiff also filed written appeal in apt time June 5, 1947, with the United States Civil Service Commission, which appeal was denied without a hearing July 14, 1947. After further written appeal to the Commission and the granting of a personal hearing September 25, 1947, before its Board of Appeals and Review, such appeal was denied October 23, 1947, by the Board of Appeals and Review, which informed plaintiff that such denial of his appeal "has been approved by the Civil Service Commissioners." Copies of the two letters dated July 14, 1947, and October 23, 1947, embodying the decisions of the United States Civil Service Commission upon said two successive appeals are hereto attached, marked respectively Plaintiff's Exhibit "J" and Plaintiff's Exhibit "K".

62 37. There have recently become once more available to plaintiff two original letters written by the Board of Legal Examiners in Washington, D. C., and mailed to plaintiff in Denver, Colorado. A copy of said first letter, dated November 26, 1942, is hereto attached, marked Plaintiff's Exhibit "L"; and a copy of the second letter, dated February 11, 1943, is hereto attached, marked Plaintiff's Exhibit "M". Each of these two letters relates to the competitive procedures which were utilized in regard to plaintiff by the Board of Legal Examiners.

38. The competitive written examination for Attorney positions, referred to in Plaintiff's Exhibit "L", was given by the Board of Legal Examiners to plaintiff in Denver, Colorado, on September 26, 1942. Plaintiff passed this examination and was so notified by the aforesaid letter dated November 26, 1942, signed by Ralph F. Fuchs, Executive Secretary of the Board of Legal Examiners (Plaintiff's Exhibit "L"), which reads in part as follows:

"Dear Mr. Elder:

"As a result of the written attorney examination which you took on September 26, you are entitled to be examined orally for a place upon the eligible register by a state examining board of the Board of Legal Examiners.

"Please appear at Judge's Chambers, Div. I, Dist. Court, Municipal Building, Denver, Colorado at 10: A.M. Tuesday, January 26, 1943. * * *"

39. The oral examination for a place on the eligible register was given to plaintiff in Denver, Colorado, January 26, 1943, at the hour and place referred to in the foregoing letter. It was held in the chambers and presence of Honorable Robert W. Steele, District Judge, on January
63 26, 1943. The plaintiff passed this oral examination and was accordingly notified by letter dated February 11, 1943, signed by Ralph F. Fuchs, Executive Secretary of the Board of Legal Examiners (Plaintiff's Exhibit "M"), which reads in part as follows:

"Dear Mr. Elder:

"I am happy to inform you that you have been included upon the register of 2000 eligibles for attorney positions which has resulted from the competitive examination of the Board of Legal Examiners in which you have participated. * * *"

40. A few months after February 11, 1943, and such announced inclusion of plaintiff upon the register of 2,000 Attorney eligibles, the plaintiff was first contacted by the Office of the Solicitor, United States Department of Agriculture, with the inquiry whether plaintiff would accept a position of Attorney in its Washington office. Prior to such inquiry plaintiff had no acquaintance with any official or employee in said agency; and plaintiff never at any time prior to June, 1947, applied for employment to the defendant or to any official or employee of defendant. The aforesaid contact, inquiry, and subsequent appointment of plaintiff to his position of Associate Attorney, grade P-3, effec-

tive August 2, 1943, were made because of the certification of plaintiff's name to defendant by the United States Civil Service Commission and Board of Legal Examiners from the aforesaid register of 2,000 Attorney eligibles upon which plaintiff was included as a result of the competitive examination, written and oral, conducted by the Board of Legal Examiners, pursuant to the competitive procedure authorized by the Ramspeck Act, Executive Order 8743, and the Civil Service Regulations at that time remaining in effect. Plaintiff alleges that he was appointed to his Attorney position August 2, 1943, by reason of and pursuant to

64 Section 17.8 of the Regulations of the Board of Legal Examiners and the register of 2,000 Attorney eligibles established and administered thereunder. Said Section 17.8, "Register of Eligibles," was adopted January 30, 1943, and published February 18, 1943, in Vol. 8, No. 34 of the Federal Register, p. 2141 (8 Fed. Reg. 2141), pursuant to Executive Order No. 8743 of April 23, 1941 (6 Fed. Reg. 2117), which Executive Order 8743 was in turn pursuant to the authority of the Ramspeck Act of November 26, 1940 [54 Stat. 1211, 5 U.S.C.A. 631(a)].

41. Plaintiff has read the affidavit of Mr. W. Edward Bawcombe filed herein August 15, 1947, and his averments at pp. 1-2 that plaintiff was appointed pursuant to "special war-time procedures" under "Section 7, Regulation 1 of the Regulations of the Board of Legal Examiners." Said "Section 7, Regulation 1" was adopted March 16, 1942, and published March 24, 1942, as Section 17.2(g) in Volume 7, No. 57 of the Federal Register, p. 2201. Under its sub-head caption, to-wit: "Procedure prior to the establishment of registers" (Sec. 17.2, 7 Fed. Reg. 2201), said Section 17.2 was manifestly inapplicable to procedure after the establishment of the register of attorney eligibles upon which plaintiff was included by the Board of Legal Examiners. Said Section 17.2 was manifestly adopted for, and applicable only to, appointments made prior to the establishment of such a register of attorney eligibles.

WHEREFORE, the promises considered, the plaintiff prays:

1. That process issue from this Court commanding the defendant to answer this suit and this amended and supplemental complaint.

2. That preliminary mandatory injunction issue directing the defendant to restore plaintiff to active duty in his position of Attorney, grade P-3, forthwith.

3. That final mandatory injunction issue directing the defendant to restore plaintiff to duty in possession of and in accordance with all the rights, privileges, and benefits that plaintiff enjoyed at the time of the wrongful separation from active duty June 6, 1947, and to permit plaintiff to receive all the rights, benefits, and privileges that would normally flow from a continuity of service on active duty from the time of the wrongful separation up to and including the final order of this Court.

4. That the Court render declaratory judgment in favor of the plaintiff as previously in detail set out in the Prayer numbered "4" on page 10 of the first Amended Complaint filed herein June 24, 1947.

5. That, because of the wrongful acts of the defendant, the plaintiff have and recover against the defendant the costs of this action.

6. That the plaintiff may have such other and further relief as to the Court may appear equitable and just.

ROBERT D. ELDER,
Plaintiff.

C. L. DAWSON,
Attorney for Plaintiff,
917 - 15th Street, N.W.,
Washington, D. C.

ROBERT D. ELDER,
Attorney for Plaintiff,
4213 - 32nd Road South,
Arlington, Virginia.

[Notarial Certificate Omitted.]

67 Filed Mar 8 1948

Plaintiff's Exhibit "F".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

June 30, 1947

To: Mr. Robert D. Elder.
From: Solicitor.
Subject: Delay of Final Action on Separation Notice.

As indicated on the reduction-in-force notice furnished you, dated May 29, 1947, your separation may be effective on or after June 30, 1947.

Pending approval of the 1948 Appropriation Act for this Department, final action is being delayed with respect to your separation until more complete information is available regarding the appropriation; so that we may then inform you of the definite action which will be taken with respect to your employment in this office.

/s/ W. Carroll Hunter.

68 Filed Mar 8 1948

Plaintiff's Exhibit "G".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

July 24, 1947

To: Robert D. Elder
From: Solicitor.

I regret to inform you that it will not be possible to rescind the separation notice issued to you. Your separation by reduction-in-force will, therefore, be effective at the close of business June 30, 1947, and you will receive a lump-sum payment for any annual leave to your credit as of that date.

The formal notification of this action will be sent to you shortly, and payment for June 30 plus your accrued annual

leave will be forwarded to you as soon as possible. If you have not already completed a Form OS-133, please complete and return the enclosed form as soon as possible, together with any building passes, identification cards, or Government property you may have in your possession. We must have this material before the check for any salary and annual leave may be delivered to you.

I wish to tell you again how much I regret the necessity for this action and to wish you every success for your future.

(s) W. CARROLL HUNTER.

Enclosure

69 Filed Mar 8 1948

Plaintiff's Exhibit "H".

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

July 30, 1947

Mr. Robert D. Elder
Leadville, Colorado

Dear Mr. Elder:

There is enclosed formal notification of your separation due to reduction in force effective June 30, 1947 c.o.b.

Sincerely yours,

/s/ W. CARROLL HUNTER,
Solicitor.

Enclosure

70 Filed Mar 8 1948

Plaintiff's Exhibit "I".

UNITED STATES DEPARTMENT OF AGRICULTURE

AD-126 REVISED
July 1945
Personnel Notification

Administration, Bureau or Office OFFICE OF THE SOLICITOR
Location Washington, D. C.

Date Jul 25, 1947

Name: Mr. Robert D. Elder.
Nature of Action: Reduction in force.

From

Position: Attorney P-3.
Grade, Salary & Position No.: P-970-3-151, $4,525.80 p.a. (Bureau No. 1061)
Bureau: Office of the Solicitor.
Branch or Div.: Production and Subsistence Division.
Headquarters: Washington, D. C.
Departmental or Field: Departmental.
Effective Date: June 30, 1947 c.o.b.
Remarks:—Employee to be paid for 584 hours annual leave which would have carried him to October 13, 1947 c.o.b.
Lack of funds.
There is no other position for which this employee has reassignment rights which is occupied by another employee subject to displacement for which this employee is qualified and willing to accept.

/s/ W. CARROLL HUNTER.
NAME OF EMPLOYMENT OFFICER

Employee's Copy

71 Filed Mar 8 1948

Plaintiff's Exhibit "J".

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

July 14, 1947

Mr. Robert D. Elder
4233 32nd Road South
Arlington, Virginia

Dear Mr. Elder:

The investigation of your appeal from separation by reduction in force from your position in the Office of the Solicitor, Department of Agriculture, has been completed.

Information obtained disclosed that you were properly reached for reduction in force action and received due written notice of your proposed separation. Since you are in a position which is excepted from the Civil Service Act and Rules, it is not mandatory that you be offered reassignment to a continuing position under Section 9 of the Retention Preference Regulations.

In view of the fact that your rights under the Retention Preference Regulations have been observed in the action taken in your case, you are advised that your appeal is denied.

Very truly yours,

/s/ JOHN A. OVERHOLT

JOHN A. OVERHOLT, *Chief*
Efficiency Ratings
Administration Section
Personnel Classification
Division

72 Filed Mar 8 1948

Plaintiff's Exhibit "K".

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

October 23, 1947

Mr. Robert D. Elder
4233 32nd Road South
Arlington, Virginia

Dear Mr. Elder:

Reference is made to your appeal, under the provisions of Section 14 of the Veterans' Preference Act of 1944, from the decision of the Commission's Personnel Classification Division, Reduction-in-Force Unit, approving your separation from the position of Attorney in the Office of the Solicitor, Department of Agriculture, in a reduction-in-force program.

The decision of the Personnel Classification Division approving the action of the Department of Agriculture in separating you was based upon a finding that you were properly placed in retention group B-1; that you were reached for separation in accordance with the Retention Preference Regulations and that you were accorded by the Department your rights under the Veterans' Preference Act and the Commission's regulations.

The Commission's Board of Appeals and Review, after a careful consideration of the facts and circumstances in your case, including the representations made by you at the hearing before this Board on September 25, 1947 and the laws and regulations applicable to your case, has found that the decision of the Personnel Classification Division was correct. The Board accordingly recommended that this decision be sustained on appeal and this recommendation has been approved by the Civil Service Commissioners.

The decision of the Commission's Personnel Classifica-

tion Division denying your appeal, therefore, has been affirmed.

By direction of the Commission:

Very respectfully,

/s/ JOHN F. EDWARDS

JOHN F. EDWARDS, *Chairman*
Board of Appeals and Review

73 Filed Mar 8 1948

Plaintiff's Exhibit "L".

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

Board of Legal Examiners
Department of Justice Building
Room 4726

November 26, 1942

Mr. Robert D. Elder,
310 W. 8th Street,
Leadville, Colo.

Dear Mr. Elder:

As a result of the written attorney examination which you took on September 26, you are entitled to be examined orally for a place upon the eligible register by a state examining Board of the Board of Legal Examiners.

Please appear for examination at Judge's Chambers, Div. I, Dist. Court, Municipal Building, Denver, Colorado at 10:00 A.M. Tuesday, January 26, 1943.

The examination will be largely directed to items in your professional training and experience and requires no advance preparation.

Very truly yours,

/s/ RALPH F. FUCHS

RALPH F. FUCHS,
Executive Secretary.

Reg. Bd.—4

74 Filed Mar 8 1948

Plaintiff's Exhibit "M."

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

Board of Legal Examiners
Department of Justice Building
Room 4726

February 11, 1943

Mr. Robert Dull Elder
310 W. 8th Street
Leadville, Colorado

Dear Mr. Elder:

I am happy to inform you that you have been included upon the register of 2000 eligibles for attorney positions which has resulted from the competitive examination of the Board of Legal Examiners in which you have participated. Your eligibility is contingent upon the outcome of a character inquiry and is limited to one year. Although the size of the register has been determined by the probable need of the Government for attorneys, the likelihood of your receiving an offer of appointment cannot be precisely forecast.

You may be approached by more than one agency of the Government as a result of your eligibility, since the agencies must determine for themselves whether you meet the requirements of particular positions. You are, of course, free to weigh the desirability of particular positions from your own standpoint, and your rejection of an offer of a particular position will not prejudice your standing upon the register. To avoid confusion and waste, a commitment once made to a particular agency should ordinarily be adhered to.

Please keep this office informed of any change in your address or of any change in circumstances which makes you unavailable for a Government legal position. Persons entering the military service will have their status preserved;

their names will, of course, be removed from the register, but if within six months after honorable discharge they request this office to restore their names, they will be placed on a then-existing register for the same grades of positions for a period of one year.

By direction of the Board.

Very truly yours,

/s/ RALPH F. FUCHS

RALPH F. FUCHS,
Executive Secretary.

Register—1

* * * * * * * * * *

75 Filed Mar 22 1948

Motion to Strike Matter From Pleading and for Summary Judgment.

Defendant moves the Court pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, as amended, to strike from the plaintiff's complaint the following allegations, on the ground that they are immaterial to the issues herein, impertinent and prejudicial:

1. "29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Robert D. Elder, from employment and active duty in his position of Attorney, Grade P-3, in the Washington office of the Office of the Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment, in wrongful preference to plaintiff, other competing employees, the same being non-veterans" preference Attorneys, Grade P-3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency rating of "very good", as well as assuming to perform functions and duties which plaintiff was and is capable of performing."

2. "31. Soon thereafter the Solicitor put back to work and employment on active duty all the non-veterans' preference Attorneys on the 'retention register' in sub-group A-2, together with a considerable number of the non-veterans' preference Attorneys in sub-group B-2, who had received such notices of separation. But neither plaintiff nor any other veterans' preference eligible among the Attorneys in the supposedly superior sub-group B-1, regardless of his professional grade or efficiency rating, has ever been put back to work or given any employment since June 6, 1947, in the Office of the Solicitor, United States Department of Agriculture."

3. "32. Among the Attorneys in the relatively inferior retention sub-group B-2, whom the Solicitor thus put back to work and continued in employment, were the following persons: (1) Virginia Merrill, (2) Lotus Threkelson, (3) Helen Lutzen, (4) Marion Poole, (5) Neil Johnson, and (6) Russell Johnston, each of whom has been
76 steadily employed as an Attorney, Grade P-3, on active duty with pay in said Washington office of the Office of the Solicitor during the several months last past, and each of whom is still steadily employed therein, although plaintiff is informed and believes that Congress has appropriated no additional funds available for such Attorney salaries since May 29, 1947. Prior to June 6, 1947, each of said six Attorneys in such inferior sub-group B-2 was on duty in said Washington office under an appointment subject to the same ostensible time limitation as that of plaintiff, to-wit: 'for the duration of the war and for six months thereafter.' When the retention register of the Office of the Solicitor was examined by this plaintiff between the dates May 29, 1947, and June 6, 1947, the name of the aforesaid Virginia Merrill, among others, appeared therein as an Attorney, Grade P-3 in sub-group B-2, whereas the name of this plaintiff appeared therein as an attorney, grade P-3, among other veterans' preference Attorneys in the supposedly superior sub-group B-1 set up by the

Civil Service Retention Preference Regulations. None of said six Attorneys in said inferior sub-group B-2 has ever been accorded a permanent or classified (competitive) civil service status. None of said six Attorneys in sub-group B-2 has ever served 'on active duty in any branch of the armed forces of the United States during any war . . .' (Veterans' Preference Act of 1944, 58 Stat. 390, 5 U.S.C.A. 851, 861). None of said six Attorneys has ever been an 'honorably discharged soldier or sailor whose record in said department is rated good . . .' (Act of August 23, 1912, 37 Stat. 413, 5 U.S.C.A. 648). None of said six Attorneys is now or ever has been a veterans' preference eligible, nor a veterans' preference employee, nor an honorably discharged soldier or sailor, nor entitled to any right, privilege, or preference as such."

4. "33. The employment and continuation in employment by defendant of said six Attorneys, Grade P-3, sub-group B-2, while defendant excluded plaintiff therefrom, was itself in violation and attempted evasion of this plaintiff's superior rights to continued employment under Sections 2 and 12 of the Veterans' Preference Act of 1944 and under Section 4 of said Act of August 23, 1912; and was also in disregard of that portion of such rights accorded by the Civil Service Retention Preference Regulations [Part 20, pp. 2849-2853, Vol. 12, No. 86, Fed. Reg. of May 1, 1947], pursuant to which defendant has asserted that he conducted the alleged separation of this plaintiff, an Attorney, Grade P-3, in the superior sub-group B-1."

5. "35. The employment and continuation in employment by defendant of the non-veteran Attorneys above-referred to, including the aforesaid six Attorneys, Grade P-3, sub-group B-2, has required and requires a far greater expenditure of funds, many times over, than would result from the employment of plaintiff, one Attorney, Grade P-3, in the superior retention sub-group B-1. The reason, 'lack of funds,' asserted by defendant to necessitate plaintiff's concurrent exclusion from such employment, does not exist and

is without justification; and this plaintiff has thereby been deprived of his aforesaid statutory rights to continuing employment without sufficient or legal cause, and without any cause whatsoever, in further violation of the requirements of section 14, Veterans' Preference Act of 1944 (5 U.S.C.A. 864), in respect of the notification and establishment of such cause and the reasons therefor."

Defendant further moves the Court upon the amended and supplemental complaint and upon the affidavits
77 of Lawson A. Moyer dated August 5, 1947 and F. Edward Bawcombe dated July 25, 1947, heretofore filed and the affidavit of F. Edward Bawcombe dated March 18, 1948, hereto annexed, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, on the ground that there are no genuine issues as to any material facts and defendant is entitled to such judgment as a matter of law and for such other and further relief as to the Court may seem just and proper.

GEORGE MORRIS FAY,
United States Attorney.

JOSEPH M. FRIEDMAN,
Assistant to the Attorney General.

LOUISE H. HUNT,
Attorney, Department of Justice.

* * * * * * * * * * *

78 Filed Mar 22 1948

Affidavit in Support of Defendant's Motion to Strike Matter From Pleading and for Summary Judgment.

CITY OF WASHINGTON, DISTRICT OF COLUMBIA, *ss:*

W. Edward Bawcombe, being duly sworn, deposes and says:

I am the Executive Assistant to the Solicitor, Office of the Solicitor, United States Department of Agriculture. This affidavit is submitted in support of a motion to strike and

for summary judgment made by the defendant in the above entitled action.

It is the purpose of this affidavit to show the complete immateriality and irrelevancy of statements made in certain paragraphs of the amended and supplemental complaint as to certain acts of the defendant performed long after the separation of the plaintiff, and having no bearing upon or connection therewith.

The plaintiff charges that these acts were in violation of, and constituted an attempted evasion of, his allegedly superior rights, thereby imputing to the defendant bad faith in effectuating a reduction in force. This imputation is completely without foundation as this affidavit will
79 show. It is also the purpose of this affidavit to bring before the Court certain facts which more clearly show the circumstances surrounding said reduction in force.

In my capacity as Executive Assistant to the Solicitor, it was my duty to prepare the register for the reduction in force action by reason of which the plaintiff's employment as an attorney, P3, in the Office of the Solicitor was terminated. The reduction in force register was prepared and separations in accordance therewith were effected in the *bona fide* belief that funds were not, and would not be, available for payment of the salaries of the employees of the Office of the Solicitor unless a reduction was made in the number of such employees. There was not prior to, or in the course of, the preparation of said reduction in force register a preconceived intent on the part of the affiant to utilize such a procedure as the means of effecting the separation of plaintiff or any other specific employee other than as such separations might be required because of a lack of available funds for salary purposes and might be dictated by the applicable Retention Preference Regulations prescribed by the United States Civil Service Commission.

In the process of the reduction in force action as a result of which the plaintiff was separated from the rolls of the Department of Agriculture, there were a total number of

twenty attorneys in Washington whose employments were likewise terminated. The twenty attorneys, including the plaintiff, were classified for Classification Act pur-
80 poses as follows: P6, 2 attorneys, P5, 4 attorneys, P4, 8 attorneys, P3, 5 attorneys, and P2, 1 attorney. They were classified under the Retention Preference Regulations as follows: A2, 3 attorneys, B1, 6 attorneys, and B2, 11 attorneys. They included all attorneys in the Washington office in retention subgroups B1 and B2 with the exception of one attorney in subgroup B2, grade P-8, who was retained because of his special qualifications and assignment as Associate Solicitor in Charge of Litigation and Special Assistant to the Attorney General. As stated in affiant's affidavit, heretofore filed in this action in support of defendant's motion for summary judgment, and hereby reaffirmed, the aforesaid reduction in force was necessitated by a lack of funds available for employment of personnel in the said Office of the Solicitor.

Some time subsequent to the effective date of the separations under the reduction in force action there were made available in the aforesaid Office of the Solicitor funds additional to those which were available at the time of the reduction in force action and in addition to the funds specifically appropriated for the Office of the Solicitor in the Department of Agriculture Appropriation Act, 1948. The funds so received were allotted to the Office of the Solicitor from appropriations for other agencies of the Department of Agriculture and the War Assets Administration by allotments which could not be anticipated by the Office of the Solicitor at the time of the reduction in force action. The Office of the Solicitor has no control over these allotments or means of predicting their availability. Further-
81 more, by reason of the resignation and transfer from the Office of the Solicitor of several attorneys subsequent to the effective date of the separations resulting from the aforesaid reduction in force action funds which otherwise would have been required for payment of their salaries

became available to the said Office of the Solicitor for employment of other personnel. The fact that such resignations and transfers would take place was unknown to affiant at the time the reduction in force action was completed. By reason of the funds made available through the aforesaid allotments, transfers, and resignations it was possible for the Office of the Solicitor to reemploy nine attorneys, including one veteran, in Washington who had been separated through the aforesaid reduction in force action and who otherwise would not have been reemployed at the time. The first of such reemployment was effected on, to-wit, October 27, 1947. The selection of the attorneys for reemployment was made upon the basis of training and experience and their particular suitability for the positions they were to fill.

W. Edward Bawcombe.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 18th day of March, 1948.

L. M. Sampson,
Notary Public.

My commission expires Aug. 7, 1952.

* * * * * * * * * * *

82 Filed Jun 2 1948

Informal Memorandum.

It seems clear that plaintiff was a war service appointee and did not have a permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations. Upon consideration of such facts plaintiff may not succeed.

Accordingly, the motion of defendant for summary judgment will be sustained and counsel will present an appropriate order to that end.

F. Dickinson Letts,
Justice.

* * * * * * * * * * *

83 Filed Jun 7 - 1948

Order for Substitution of Party Defendant.

Upon application of the plaintiff, and it appearing to the Court that the abovenamed Defendant, Clinton P. Anderson, has resigned from the office of Secretary of Agriculture and that Charles F. Brannan is now the duly appointed, confirmed, qualified, and acting Secretary of Agriculture, it is, by the Court, this 7th day of June, 1948,

ORDERED, that Charles F. Brannan, Secretary of Agriculture, Defendant, be substituted as the Defendant herein, and

That this cause may be continued and maintained against the said Charles F. Brannan, Secretary of Agriculture, Defendant, in all respects as formerly against his predecessor in such office, Clinton P. Anderson.

T. ALAN GOLDSBOROUGH,
Justice.

Consented to:

C. L. DAWSON,
ROBERT D. ELDER,
Counsel for Plaintiff.

JOSEPH M. FRIEDMAN,
LOUISE H. HUNT,
Counsel for Defendant.

* * * * * * * * * * *

84 Filed Jun 9 1948

Motion for Rehearing.

The plaintiff moves the Court for a rehearing upon the defendant's Motion for Summary Judgment.

Plaintiff shows that the decision of this Court granting same is in conflict and incompatible with the decision of the Supreme Court of the United States handed down the same

dated June 1, 1948, in the case of Earle W. Hilton v. John L. Sullivan, Secretary of the Navy (No. 560—October Term, 1947) on Writ of Certiorari to the Court of Appeals for the District of Columbia granted 333 U. S..... Memorandum of law herewith.

C. L. Dawson,
917 15th Street, N. W.
Washington, D. C. NA 8668

Robert D. Elder,
4233 32nd Road South
Arlington, Va. AL 2349
Attorneys for Plaintiffs.

* * * * * * * * * *

85 Filed Jun 11 1948

Order Overruling Motion for New Trial.

Upon the coming on for hearing of the motion filed herein by plaintiff, for a new trial, it is this 11th day of June, 1948, ordered that said motion be, and the same is hereby overruled.

Harry M. Hull, *Clerk.*
By Irene B. Burroughs,
Deputy Clerk.

By direction of
Justice F. Dickinson Letts.

* * * * * * * * * *

86 Filed Jun 22 1948

Order.

Upon consideration of the motion of defendant for summary judgment and to strike, the affidavits and points and authorities in support thereof, upon argument of counsel in open court and upon all the proceedings herein, and the Court being fully advised in the premises, it is by the Court this 22nd day of June 1948,

ORDERED, ADJUDGED AND DECREED that, the motion of defendant for summary judgment be, and the same hereby is, granted.

By the Court:

F. DICKINSON LETTS,
Justice.

Approved as to Form:
C. L. DAWSON,
ROBERT D. ELDER,
Attorneys for Plaintiff.

JOSEPH M. FRIEDMAN, JR.,
Special Assistant to the Attorney General.

LOUISE H. HUNT,
Attorney, Department of Justice.
Attorneys for Defendant.

87 Filed Jun 28 1948

Notice of Appeal.

Notice is hereby given this 28th day of June, 1948, that Robert D. Elder hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of June, 1948 in favor of Charles F. Brannan, Secretary of Agriculture, against said Robert D. Elder.

C. L. DAWSON,
ROBERT D. ELDER,
Attorney for
Plaintiff Robert D. Elder.

93 Filed Jun 5 1947

In the District Court of the United States
For the District of Columbia

Civil Action No. 2335

GREENE CHANDLER FURMAN, c/o Maxwell Hotel, 1927 G Street, N.W., Washington, D. C., *Plaintiff*

vs.

CLINTON P. ANDERSON, Secretary of Agriculture, Washington, D. C., *Defendant.*

Suit for a Temporary and Permanent Injunction to Compel the Retention or Reinstatement of Plaintiff, an Honorably Discharged Veteran of the United States, to a Position as Attorney Under the Jurisdiction of the Defendant, for a Declaratory Judgment, and for Such Other Relief as May be Equitable and Just.

The plaintiff for his cause of action complains of the defendant and alleges:

1. That the plaintiff is a citizen of the United States, and resides at the Maxwell Hotel, 1927 G Street, N.W., in the City of Washington, District of Columbia, and that his permanent domicile is in the City of Shreveport, State of Louisiana.

2. That the defendant is the duly appointed, acting and qualified Secretary of the United States Department of Agriculture, and in such capacity is charged by law with the administration of all laws enacted by the Congress of the United States relating to the United States Department of Agriculture, and is specifically charged by law with the employment of all personnel, including your plaintiff, an attorney in the office of the Solicitor, under the jurisdiction of the United States Department of Agriculture.

3. That employees of the United States Department of Agriculture are required to be qualified in their
94 various employment positions according to provisions of the Civil Service Act, the rules and regula-

tions of the Civil Service Commission, and are in a classification which is generally known as the classified and unclassified civil service of the United States. That the defendant is required under the laws of the United States to fill any and all positions in the United States Department of Agriculture falling within the classified and unclassified civil service from persons who have been found to be duly qualified for such positions by the United States Civil Service Commission.

4. That the plaintiff was a Reserve Officer of the United States Army from 1930 to May 1942. That on January 27, 1942, he was ordered on active duty in the grade of First Lieutenant. That on February 26, 1942, by reason of physical disqualification, he was relieved from active duty. That on May 5, 1942, he was honorably discharged because of physical disability.

5. That he has had 12 years practice of law prior to employment by the Office of the Solicitor, United States Department of Agriculture, appearing before all of the State and Federal Courts of the State of Louisiana and the United States Circuit Court of Appeals for the Fifth Circuit; that he has the academic degrees of LL.B and LL.M in law; that he took the Federal Civil Service Legal Examination given by the United States Civil Service Commission in September 1942, and was one among approximately 2,000 lawyers out of approximately 14,000 taking the examination in the United States who qualified thereunder and whose name was placed on the Civil Service Register of attorney eligibles.

6. That on or about July 26, 1943, plaintiff was employed as Attorney, grade P-3, in the Office of the Solicitor, United States Department of Agriculture, and has continued in this position and grade until the present time.

7. That plaintiff has established Veteran's Preference under the laws of the United States and the rules and regulations of the United States Civil Service Commission and the United States Department of Agriculture,
95 and is a preference eligible employed in the Office of the Solicitor, United States Department of Agricul-

ture and has completed his probationary or trial period. That on or about May 1, 1947, there was delivered to the plaintiff a notice of "Conversion to Excepted Appointment (Schedule A-1-4)", which notice is attached hereto and by reference made a part hereof. Plaintiff has attempted to discover the meaning of this conversion but has been unable to do so. He has, however, heard that all attorneys in the Office of the Solicitor, United States Department of Agriculture, were placed in this group and that by so doing the previous designations of war service appointee and permanent or career appointees were abolished, and that all attorneys in the Office of the Solicitor, United States Department of Agriculture, are competing regardless of their former status on an equal basis the veteran preference eligibles having preference over all non-veteran attorneys, otherwise seniority being determined by length of service. Plaintiff can find no authority for this statement but as it is a common report he alleges said facts to be true to the best of his information, knowledge and belief.

8. That plaintiff has been continuously employed as an attorney in the Office of the Solicitor, United States Department of Agriculture for four years less approximately two months and that all of his efficiency ratings have been good or better.

9. That at approximately 5:30 P.M. on May 29, 1947, plaintiff received a notice of discharge or separation, a portion of which reads as follows:

May 29, 1947

"Retention Subgroup of employee—B-1.

"To: Greene C. Furman.

"From: Solicitor.

"Subject: Notice To Employee Affected by Reduction in Force.

"A reduction in force brought about by Lack of Funds necessitates your being separated, effective on or after ..... Your last day of active duty in your present position will be on Jun 5 1947 c.o.b."

96 The alleged separation notice being signed "W. Carroll Hunter." Said notice is attached hereto and by reference made a part hereof. On June 2, 1947, the following business day, plaintiff wrote a letter to the said W. Carroll Hunter denying the legality of the notice hereinabove mentioned and requesting that same be revoked, a copy of which letter is attached hereto and by reference made a part hereof. To this letter the said W. Carroll Hunter replied in a memorandum dated June 2, 1947, denying plaintiff's request, the original of which reply is attached hereto and by reference made a part hereof.

10. That the provisions of the Veterans' Preference Act of 1944 provides among other things as follows:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, . . ." Title 5, U.S.C.A. 863.

11. The plaintiff alleges that now and during all of the time that he has been employed under the jurisdiction of the defendant as hereinabove alleged that he is entitled to all the rights, benefits, and privileges of the Civil Service Act, its various amendments, the Act of August 23, 1912, 5

U.S.C.A. 648 and the provisions of the Veterans Preference Act of June 27, 1944, and that the provisions of said Acts are binding on the part of said defendant.

12. The plaintiff alleges that the notice given to the plaintiff as alleged in paragraph 9 hereof is not a good or sufficient notice to meet the requirements of the statute
97 of such cases made and provided as pleaded in part and that unless this defendant is restrained by this Court that he will wrongfully and illegally separate the plaintiff from government service, and that the plaintiff has no speedy, adequate, remedy at law.

13. Plaintiff alleges that a controversy exists between the plaintiff and the defendant and defendant's agents over the legality of the separation notice herein complained of and that plaintiff is entitled to a declaratory judgment declaring said alleged separation notice a nullity and of no force and effect whatsoever, and a judgment continuing plaintiff in his present employment in an active status as a P-3 Attorney in the Office of the Solicitor, United States Department of Agriculture.

14. Plaintiff further alleges that he has been informed and therefore avers that the separation register and the retention register of the attorneys of the Office of the Solicitor of the United States Department of Agriculture has been wrongfully and/or illegally set up contrary to law and regulations in a number of particulars. First, that certain persons have been wrongfully and/or illegally protected from separation. Second, that certain persons have been given a type of status to which they are not entitled by law thus protecting them from the separation procedure complained of. Third, that the competitive levels and areas of competition have been improperly determined. Fourth, that there are positions which the plaintiff is capable and qualified under the law and regulations to fill and that for these positions he has department wide preference both in the Washington Office and in the field which have not been exercised in his behalf. That on June 4, 1947, plaintiff made

amicable demand in writing on Mrs. Pauline C. Wood, Chief, Personnel Section, Office of the Solicitor, United States Department of Agriculture, to see said separation and retention registers, a copy of which amicable demand is attached hereto and by reference made a part hereof. Said demand has thus far been orally refused but plaintiff has been told that the request has been referred to a higher authority. Plaintiff was allowed to examine the registers of the P-3s in the Washington, D. C. Office.

98

That plaintiff believes and therefore avers that these improper registers and their application to plaintiff's case may have resulted in your plaintiff's receiving the aforementioned illegal notice of separation.

15. Plaintiff alleges that a controversy exists between the plaintiff and the defendant and the defendant's agents over the legality and correctness of the separation and retention registers of the attorneys in the Office of the Solicitor, United States Department of Agriculture, as hereinabove set forth and that plaintiff is entitled to a declaratory judgment declaring the wrongful and illegal method in which the separation and retention registers of the Office of the Solicitor, United States Department of Agriculture, have been set up and setting aside said separation and retention registers insofar as they improperly affect the plaintiff's retention in his employment.

16. That on June 4, 1947, plaintiff wrote a memorandum to the aforementioned W. Carroll Hunter as result of his reply to plaintiff's first letter of June 2, 1947, and certain oral conversations with the said W. Carroll Hunter. A copy of the said memorandum of June 4, 1947, is attached hereto and by reference made a part hereof. That plaintiff has thus far received no reply to said letter of June 4, 1947.

WHEREFORE the plaintiff prays:

1. That due process of this Court issue directing and commanding the defendant to appear and answer this bill of complaint.

2. That this Court issue a temporary injunction restraining said defendant, his agents, and officials from separating the plaintiff from active duty in and from his position as Attorney P-3 in the Office of the Solicitor, United States Department of Agriculture, at least until such a time as this Court shall determine the issues involved in this litigation and that the Court on final hearing order that the temporary injunction be made permanent.

99 3. That there be a declaratory judgment in plaintiff's favor declaring the separation notice set forth and complained of in this complaint a nullity and of no force and effect whatsoever, and that there be judgment continuing plaintiff in his present employment in an active status as a P-3 Attorney, in the Office of the Solicitor, United States Department of Agriculture.

4. That there be a declaratory judgment in plaintiff's favor declaring the wrongful and illegal nature of the separation and retention registers of the Office of the Solicitor, United States Department of Agriculture, insofar as this Court may determine and declaring the nullity of said separation and retention registers insofar as they illegally and/or wrongfully affect the plaintiff's retention in his active employment.

5. That because of the illegal and unlawful acts of the defendant, the plaintiff have, and recover against the defendant personally, the costs of this action.

6. That the plaintiff have such other and further relief as to the Court may appear to be equitable and just.

GREENE CHANDLER FURMAN,
Plaintiff.

C. L. DAWSON,
Attorney for the Plaintiff,
917 18th Street, N.W.,
Washington, D. C.

[Notarial Certificate omitted.]

• • • • • • • • • • •

[Exhibits attached to Complaint in C. A. No. 2335-47 omitted, since they are similar to exhibits of Plaintiff Robert D. Elder.]

• • • • • • • • • • •

112 Filed Jun 28 1948

Notice of Appeal.

Notice is hereby given this 28th day of June, 1948, that Greene Chandler Furman hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of June, 1948 in favor of Charles F. Brannan, Secretary of Agriculture, against said Greene Chandler Furman.

C. L. DAWSON,
ROBERT D. ELDER,
Attorney for
Plaintiff Greene Chandler
Furman.

• • • • • • • • • • •

113 Filed Jun 28 1948

Designation of Consolidated Record on Appeal and Stipulation Pursuant to Rule 12 (c) of the Court of Appeals of the District of Columbia.

Each of the above-named plaintiffs and defendant designates the following portions of the record of proceedings and evidence to be contained in the consolidated record on appeal:

1. Complaint filed June 5, 1947 by Robert D. Elder in Civil Action No. 2336-47, with attached Exhibits "A", "B", and "C".

2. Amended Complaint filed June 24, 1947 in Civil Action No. 2336-47, with attached Exhibits "D" and "E".

3. Defendant's Motion for Summary Judgment filed August 15, 1947 in Civil Action No. 2336-47, with attached affidavits and exhibits in support.

4. Affidavit of Robert D. Elder filed September 5, 1947 in Civil Action No. 2336-47 in opposition to defendant's Motion for Summary Judgment.

5. Order dated March 5, 1948 granting leave to file Amended and Supplemental Complaint.

6. Amended and Supplemental Complaint filed March 8, 1948 in Civil Action No. 2336-47, with attached Exhibits "F", "G", "H", "I", "J", "K", "L", and "M".

114 7. Defendant's Motion to Strike matter from pleading and for Summary Judgment filed March 22, 1948 in Civil Action No. 2336-47, with annexed affidavit of W. Edward Bawcombe dated March 18, 1948 in support.

8. Informal Memorandum by Mr. Justice F. Dickinson Letts filed June 2, 1948 in Civil Action No. 2336-47, sustaining defendant's Motion for Summary Judgment.

9. Order for Substitution of Party Defendant filed June 7, 1948 in Civil Action No. 2336-47.

10. Motion for rehearing filed June 9, 1948.

11. Order dated June 11, 1948 denying Motion for rehearing.

12. Order, judgment, and Decree filed June 21, 1948 in Civil Action No. 2336-47, granting defendant's Motion for Summary Judgment.

13. Notice of Appeal by Robert D. Elder in Civil Action No. 2336-47.

14. Complaint filed June 5, 1947 by Greene Chandler Furman in Civil Action No. 2335-47.

15. Notice of Appeal by Greene Chandler Furman in Civil Action No. 2335-47.

16. This Designation of Consolidated Record on Appeal and Stipulation pursuant to Rule 12 (c) of the Court of Appeals for the District of Columbia.

Stipulation.

Since these are appeals from judgments in two cases consolidated for hearing in the District Court, compliance is required with Rule 12 (c) of the United States Court of Appeals for the District of Columbia. It is accordingly

stipulated and agreed upon by all parties to the appeals, solely for the purpose of such appeals:

That the material facts in each of the above cases are substantially identical and involve identical questions of law.

That each of the filings above designated under paragraphs numbered "1" to "13" inclusive, is a substantial duplication of a corresponding filing of the same description and substance filed on the same date in Civil Action No. 2335-47, which case the District Court consolidated for hearing with the aforesaid Civil Action No. 2336-47. That the matters set up and alleged on the part of the plaintiff Robert D. Elder, in Civil Action No. 2336-47, shall with like effect be deemed the matters set up and alleged on
115 the part of the plaintiff Greene Chandler Furman, as in the corresponding filings in Civil Action No. 2335-47. That the matters set up and averred on the part of the defendant with respect to the plaintiff Robert D. Elder, in Civil Action No. 2336-47, shall with like effect be deemed the matters set up and averred on the part of said defendant with respect to the plaintiff Greene Chandler Furman, as in the corresponding filings in Civil Action No. 2335-47. That the matters stated, considered, and determined by the District Court with respect to the defendant and to the plaintiff Robert D. Elder, in Civil Action No. 2336-47, shall with like effect be deemed the matters stated, considered, and determined by the District Court with respect to the plaintiff Greene Chandler Furman, as in the corresponding filings in Civil Action No. 2335-47.

C. L. Dawson,
917 15th Street, N.W.,
Washington, D. C. NA 8668
Robert D. Elder,
4233 32nd Road South,
Arlington, Va. AL 2349

Attorneys for Plaintiffs.

Joseph M. Friedman,
Louise H. Hunt,
Attorneys for Defendant.

Wednesday, December 7, 1949

* * * * *

No. 10007, April Term, 1950

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008, April Term, 1950

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Before HONORABLE WILBUR K. MILLER, E. BARRETT PRETTYMAN and DAVID L. BAZELON, Circuit Judges

* * * * *

On motion of Mr. Claude L. Dawson, Mr. Robert D. Elder of the Bar of the Supreme Court of Colorado was permitted to argue for appellants pro hac vice by special leave of Court.

On motion of Mr. Edward H. Hickey, Mr. Eugene T. Maher of the Bar of the Court of Appeals of the State of New York was permitted to argue for appellee pro hac vice by special leave of Court.

Argument commenced by Mr. Robert D. Elder for appellants, continued by Mr. Eugene T. Maher for appellee, concluded by Mr. Elder. Appellee granted leave to submit by December 12, 1949, memorandum on "Competitive Status."

United States Court of Appeals for the District of Columbia Circuit. Filed Jun 15, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10007

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Appeal from the United States District Court for the District of Columbia

Argued December 7, 1949 Decided June 15, 1950

Mr. Robert D. Elder, of the Bar of the Supreme Court of Colorado, *pro hac vice*, by special leave of Court, with whom *Mr. Claude L. Dawson* was on the brief, for appellants.

Mr. Eugene T. Maher, Attorney, Department of Justice, of the Bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Assistant Attorney General Morison* and *Messrs. George Morris Fay*, United States Attorney, and *Edward H. Hickey*, Special Assistant to the Attorney General, were on the brief, for appellee.

Messrs. Charles Fahy and *Philip Levy* filed a brief on March 26, 1949, as amicus curiae for National Association of Federal Career Employees, urging affirmance.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

WILBUR K. MILLER, Circuit Judge: The appellant, Robert D. Elder, was honorably discharged from the United States Army after active service in World War I.[1] He passed a competitive civil serv-

[1] There are two appeals here. Elder is the appellant in case No. 10007 and Greene Chandler Furman is the appellant in case No. 10008. These men filed separate independent suits in the District

ice legal examination in September, 1942, and on August 1, 1943, was employed as an attorney in the Department of Agriculture. Although he had had at all times an efficiency rating of "good" or better, he was notified on May 29, 1947, that, as a part of a reduction in force made necessary by lack of funds, he would be dismissed as of June 30, 1947. He sued on June 5, 1947, to enjoin the Secretary of Agriculture from discharging him, claiming the right to be retained because of the statutory preference given to veterans. After his dismissal he continued his effort, by amended and supplemental complaint, to obtain an adjudication that he had been wrongfully discharged and should be reinstated. The Secretary moved for summary judgment, with respect to which affidavits were filed by both sides. The District Court in granting the motion said:

> "It seems clear that plaintiff was a war service appointee and did not have a permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations. Upon consideration of such facts plaintiff may not succeed."

Elder appeals. He claims that by passing a competitive civil service legal examination and by serving a probationary period of one year, he attained a classified civil service status and that under statutory provisions [2] he had an absolute right not to be discharged, dropped or reduced in rank or salary in the event of a reduction in force. He further maintains that, even if he had not acquired classified civil service status, he had under these statutes a preference in retention and reinstatement which had been violated.

The Secretary replies that appellant was a war service appointee whose tenure was limited to the duration of World War II and six months thereafter, and that he had not attained the classified civil service status he claims. He asserts that Elder was properly classified in group B-1 under the Civil Service Commission regulations governing the retention preference of veterans in a reduction in force,[3] that those regulations are valid under § 12 of the Veterans'

Court but, because they involved substantially identical facts and presented identical questions of law, the cases were consolidated and heard together in the District Court and were briefed and argued as one before us. This opinion applies in its entirety to Furman's case as well as to Elder's.

[2] The proviso of § 4 of the Act of August 23, 1912, 37 STAT. 413, ch. 350, § 4, 5 U. S. C. A. § 648; Veterans' Preference Act of 1944, and especially §§ 2, 12, 14 and 18 thereof, 58 STAT. 387, ch. 287, 5 U. S. C. A. §§ 851, 861, 863 and 867.

[3] See footnote 4.

Preference Act of 1944 and that the appellant's dismissal was in accord with the regulations. The Secretary claims the proviso of § 4 of the Act of 1912 does not apply to war service appointees.

The first question then is whether Elder had reached or become entitled to classified (competitive) civil service status.

Executive Order No. 9063, issued February 16, 1942 (3 Code Fed. Regs., Cum. Supp. 1943, 1091), authorized the Civil Service Commission to adopt such special procedures and regulations as it might deem necessary to avoid delay in recruiting employees during the war emergency. The President expressly provided, however, that persons appointed under such special procedures to positions subject to the Civil Service Act and the Commission's rules should not thereby acquire a classified (competitive) civil service status, but, in the Commission's discretion, might be retained for the duration of the war and six months thereafter.

Pursuant to this Executive Order, the Civil Service Commission prepared and adopted the War Service Regulations effective March 16, 1942 (5 Code Fed. Regs., § 18.3, Cum. Supp. 1943), setting up special procedures of the sort and for the purpose contemplated by the Order. The subsequent appointment of attorneys was governed by the regulations of the Board of Legal Examiners of the Civil Service Commission, which contained the following (5 Code Fed. Regs. § 17.1, Cum. Supp. 1943):

> "(g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointment shall be effected under Executive Order No. 9063 of February 16, 1942, (Title 3, *supra*), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passing an appropriate examination prescribed by the Board or, (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in other respects be governed by the requirements and procedures prescribed by these regulations. This paragraph shall become effective March 16, 1942."

Since the foregoing was the regulation in effect at the time the appellant was appointed, his acceptance of employment necessarily was subject to the terms thereof. Nothing occurred later to change the nature of his status or tenure. It follows that throughout the period of his employment he was a war service appointee with tenure limited

to the duration of the war and a period of six months thereafter, entitled to the preference given by law to veterans in that status.

Elder's preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status. But he has preference under the Veterans' Preference Act of 1944, and particularly under §§ 2 and 12. The latter provides that

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: . . . *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees . . ."

We held in *Hilton* v. *Forrestal*, 83 U. S. App. D. C. 44, 165 F. (2d) 251 (1947), that the term "competing employees" used in § 12 of the Act refers to employees competing within the bounds of such classifications as the Commission might establish by regulations. The Civil Service Commission promulgated on May 1, 1947, retention preference regulations for use in reductions in force which set up classifications for the grouping of employees so that those classified in each group would be regarded as "competing" with one another. Those classifications and the subgroups into which they were divided, which are reproduced below,[4] were approved by us in the *Hilton* case.

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[4] 5 Code Fed. Regs. § 20.3, Supp. 1947.

"§ 20.3. *Retention preference*—(a) *Classification.* For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

"*Group A*: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the

We do not read the Supreme Court's opinion in *Hilton* v. *Sullivan*, 334 U. S. 323 (1948), as holding to the contrary. It results that, since the appellant was a war service appointee with an efficiency rating not less than "good", he was properly classified in group B and subgroup B-1, a status which gave him the highest preference for retention among all war service appointees whenever a reduction in force became necessary.

The record does not clearly show that any war service appointee of Elder's grade or lower, with a classification for retention preference inferior to subgroup B-1, was retained when he was discharged, so it does not appear that his preferential right to be retained was directly violated. We note, however, that appellant's preference as a member of subgroup B-1 is not limited to the right to be *retained* over competing employees in lower subgroups when reductions in force occur; by express congressional enactment his preference

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Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

* * * * *

"A-1 Plus during one-year period after return to duty, as required by law.

"A-1 With veteran preference unless efficiency rating is less than 'Good.'

"A-2 Without veteran preference unless efficiency rating is less than 'Good.'

"A-3 With veteran preference where efficiency rating is less than 'Good.'

"A-4 Without veteran preference where efficiency rating is less than 'Good.'

"*Group B*: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

* * * * *

"B-1 With veteran preference unless efficiency rating is less than 'Good.'

"B-2 Without veteran preference unless efficiency rating is less than 'Good.'

"B-3 With veteran preference where efficiency rating is less than 'Good.'

"B-4 Without veteran preference where efficiency rating is less than 'Good.'

"*Group C*: All employees serving under appointments specifically limited to one year or less, all non-citizen employees

extends also to reinstatement and re-employment. For § 2 of the Act of 1944 provides:

> "In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; . . . preference shall be given to . . . (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, . . . and have been separated therefrom under honorable conditions; . . ."

Elder's rights under this section of the statute were violated if he was denied reinstatement or re-employment when other attorneys, classified in a lower subgroup than B-1, who had been released with him, were re-employed. He alleges that this happened. He pleads that soon after the reduction in force said to have been due to lack of funds, certain attorneys of the same grade as his, but who were in a lower classification under the regulations for retention, were reinstated or re-employed as attorneys in the office of the Solicitor for the Department of Agriculture, but that he was denied re-employment. The complaint gives the names of six attorneys of the lower retention subgroup B-2 so re-employed in preference to the appellant.[5]

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serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2(b) of the Civil Service Retirement Act, as amended.

* * * * *

"C-1 With veteran preference unless efficiency rating is less than 'Good.'

"C-2 Without veteran preference unless efficiency rating is less than 'Good.'

"C-3 With veteran preference where efficiency rating is less than 'Good.'

"C-4 Without veteran preference where efficiency rating is less than 'Good.'"

[5] These paragraphs from appellant's amended and supplemental complaint contain the allegations to which we refer:

"29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Robert D. Elder, from employment and active duty in his position of Attorney, Grade P-3, in the Washington office of the Office of the

These allegations, which charge wrongful discrimination against Elder in the reinstatement of non-veterans in October, 1947, were not denied by the Secretary and nothing in the affidavits which he filed tends to contradict them. There was, therefore, no genuine issue concerning the material fact that Elder's right to preference in re-employment had thereby been denied him. So, on the record presented to him, the trial judge erred in granting summary judgment to the Secretary of Agriculture; to the contrary, the appellant was entitled to summary judgment in the state of the pleadings.

We note, however, that appellee's motion for summary judgment apparently was based on his mistaken idea that the only question in

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Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment, in wrongful preference to plaintiff, other competing employees, the same being non-veterans' preference Attorneys, Grade P-3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency rating of 'very good', as well as assuming to perform functions and duties which plaintiff was and is capable of performing.

* * * * *

"31. Soon thereafter the Solicitor put back to work and employment on active duty all the non-veterans' preference Attorneys on the 'retention register' in sub-group A-2, together with a considerable number of the non-veterans' preference Attorneys in sub-group B-2, who had received such notices of separation. But neither plaintiff nor any other veterans' preference eligible among the Attorneys in the supposedly superior sub-group B-1, regardless of his professional grade or efficiency rating, has ever been put back to work or given any employment since June 6, 1947, in the Office of the Solicitor, United States Department of Agriculture.

"32. Among the Attorneys in the relatively inferior retention sub-group B-2, whom the Solicitor thus put back to work and continued in employment, were the following persons: (1) Virginia Merrill, (2) Lotus Threkelsen, (3) Helen Lutzen, (4) Marion Poole, (5) Neil Johnson, and (6) Russell Johnston, each of whom has been steadily employed as an Attorney, Grade P-3, on active duty with pay in said Washington office of the Office of the Solicitor during the several months last past, and each of whom is still steadily employed therein, although plaintiff is informed, and believes that Congress has appropriated no additional funds available for such Attorney salaries since May 29, 1947. Prior to June 6, 1947, each of said

the case was whether Elder's discharge was lawful. The appellee seems to have overlooked the appellant's charge of discriminatory re-employment, for he did not deny the charge nor treat with it in the affidavits which he filed. The trial judge also failed to consider the undenied allegations concerning discrimination in re-employment, else he would not have awarded summary judgment to the appellee. It is possible that, upon remand, the Secretary may be able to raise an issue of fact concerning the alleged discrimination against Elder in the re-employment of attorneys. *Fountain* v. *Filson*, 336 U. S. 681 (1949), seems to indicate that he should be given an opportunity to do so. The judgments are reversed and the cases will be remanded. If the record remains as it is, the District Court should enter summary judgments to the effect that on October 27, 1947, both appellants were wrongfully denied reinstatement. But if the Secretary of Agriculture denies the allegations of discrimination against the appellants in re-employment, the District Court will, of course, proceed to determine the issue of fact thereby created.

Reversed and remanded.

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six Attorneys in such inferior sub-group B-2 was on duty in said Washington office under an appointment subject to the same ostensible time limitation as that of plaintiff, to-wit: 'for the duration of the war and for six months thereafter.' . . . None of said six Attorneys in said inferior sub-group B-2 has ever been accorded a permanent or classified (competitive) civil service status. None of said six Attorneys in sub-group B-2 has ever served 'on active duty in any branch of the armed forces of the United States during any war . . .' (Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C. A. 851, 861). None of said six Attorneys has ever been an 'honorably discharged soldier or sailor whose record in said department is rated good . . .' (Act of August 23, 1912, 37 Stat. 413, 5 U. S. C. A. 648). None of said six Attorneys is now or ever has been a veterans' preference eligible, nor a veterans' preference employee, nor an honorably discharged soldier or sailor, nor entitled to any right, privilege, or preference as such.

* * * * *

"34. In addition to the above Attorneys, Grade P-3, in sub-group B-2, the defendant has concurrently continued in employment on active duty a considerable number of other Attorneys in Grade P-4 and higher, who are non-veterans in said sub-group B-2 and none of whom has ever been accorded permanent or classified (competitive) civil service status. One such Attorney, who is a non-veteran serving under an indefinite war-service appointment in sub-group B-2, was on

United States Court of Appeals for the District of Columbia Circuit. Filed Jun 15, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10,007, April Term, 1950

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10,008, April Term, 1950

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and were argued by counsel.

May 29, 1947, and thereafter, unlawfully withheld from the prescribed operation of the Civil Service Retention Preference Regulations and has never been the recipient of a separation notice. Each of the aforesaid acts was likewise in violation of plaintiff's statutory rights and the regulations.

"35. The employment and continuation in employment by defendant of the non-veteran Attorneys above-referred to, including the aforesaid six Attorneys, Grade P-3, sub-group B-2, has required and requires a far greater expenditure of funds, many times over, than would result from the employment of plaintiff, one Attorney, Grade P-3, in the superior retention sub-group B-1. The reason, 'lack of funds,' asserted by defendant to necessitate plaintiff's concurrent exclusion from such employment, does not exist and is without justification; and this plaintiff has thereby been deprived of his aforesaid statutory rights to continuing employment without sufficient or legal cause, and without any cause whatsoever, in further violation of the requirements of section 14, Veterans' Preference Act of 1944 (5 U. S. C. A. 864), in respect of the notification and establishment of such cause and the reasons therefor."

On consideration whereof, It is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby, reversed, and that these causes be, and they are hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

Per Circuit Judge WILBUR K. MILLER.

Dated: June 15, 1950.

United States Court of Appeals for the District of Columbia Circuit. Filed Jun 30, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10007

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

PETITION FOR REHEARING

Comes now the appellee and respectfully petitions this honorable Court that it grant a rehearing in each of the above-entitled cases and in support of said petition respectfully shows and alleges:

1. In its opinion in these cases, this Court held that appellants' amended and supplemental complaints alleged violations of appellants' preference as veterans to reemployment in the Office of the Solicitor of the Department of Agriculture. This preference to reemployment the Court found to be given by Section 2 of the Veterans Preference Act of 1944[1] So construed, the section is said to give appellants, as veterans, a preference to reemployment that is identical to the preference to retention in the service set forth in Section 12 of the statute.[2]

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[1] 5 U. S. C. Sec. 851.

[2] 5 U. S. C. Sec. 861.

Prior to the decision of this Court the pleadings in these cases had never been considered to present the issue of appellants' reemployment rights or preferences. Neither in the court below nor in this Court did the parties argue or brief this question. The sole contention urged by appellants throughout the litigation of these cases related to the alleged violation of their rights to retention in the positions from which they were respectively separated in a reduction in force on June 30, 1947.

We respectfully suggest that the Court's construction of Section 2 of the Veterans Preference Act of 1944 is not in harmony with the other provisions of that statute and the regulations of the Civil Service Commission issued pursuant thereto.[3] Section 2 of the statute merely states that "a preference" shall be extended to veterans and proceeds to enumerate the situations in which the preference will be given and the classes of veterans who will be entitled to it. The remaining sections of the statute define the preference provided for the various situations enumerated in Section 2.

Thus, as this Court held, appellants' preference to retention is defined by Section 12 of the Act, and not by Section 2. In Sections 15, 7, 8, and 9[4] the Act provides in detail for a preference to veterans for reemployment which is not the same or the equivalent of the preference to retention in employment which is granted by the provisions of Section 12 of the statute.

In *Hilton* v. *Forrestal*, 165 F. (2d) 251, aff'd. 334 U. S. 323, this Court held valid Civil Service Commission regulations under Section 12 of the statute by which veterans are given an absolute preference for retention over competing non-veterans within the classification established by the regulations. In general, the preference to reemployment conferred by Sections 15, 7, 8, and 9 of the Act requires only that veteran applicants be rated individually with competing nonveterans, veteran status being assigned a numerical value. Appellants' pleadings fail to allege a violation of this preference and appellants are in fact unable to make such allegations since appellee fully accorded them the preference established by these sections of the statute and regulations. (Affidavit of Bawcombe, J. A. 69-72.)

Appellee does not believe that this Court contemplated a construction of the statute which does violence to its plain terms, or that it intended to invalidate clearly reasonable regulations of the Civil Service Commission, all without briefing or argument by the parties and without discussion or mention in its opinion. This, however, is the effect of the Court's ruling in these cases.

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[3] 5 C. F. R. 1947 Supp., Sec. 21.6 (b).

[4] 5 U. S. C. Secs. 856, 857, 858, 864.

2. If the Court is of the view that the record is not sufficiently clear as to this question, however, and if a rehearing is not desired, it is respectfully requested that the Court modify its opinion to direct the receipt of proof by the lower court on the issue of appellee's compliance with the provisions of Sections 15, 7, 8, and 9 of the Veterans Preference Act of 1944 and the applicable regulations of the Civil Service Commission, and that the Court's mandate be shaped accordingly.

Respectfully submitted.

NEWELL A. CLAPP,
Acting Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
EDWARD H. HICKEY,
Attorney, Department of Justice.

Of Counsel:

EUGENE T. MAHER,
Attorney, Department of Justice.

CERTIFICATE

Edward H. Hickey, attorney for appellee, hereby certifies that this petition for rehearing is presented in good faith and not for purposes of delay.

EDWARD H. HICKEY,
Attorney, Department of Justice,
Attorney for Appellee.

CERTIFICATE OF SERVICE

I hereby certify this 30th day of June, 1950, that I have sent a copy of appellee's foregoing petition for rehearing to counsel for appellants, Claude L. Dawson, Esq., at his address, 917 15th Street, N.W., Washington, D. C., by official United States mail.

EDWARD H. HICKEY,
Attorney for Appellee.

United States Court of Appeals for the District of Columbia Circuit

No. 10007, October Term, 1950

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE.

No. 10008, October Term, 1950

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE.

Before: WILBUR K. MILLER, PRETTYMAN and BAZELON, JJ.

ORDER

On consideration of the appellee's petition for rehearing of the appeals herein, and of the appellants' petition for modification of the opinion and judgment herein, It is

Ordered by the Court that the petition for rehearing be, and it is hereby, denied, and that the petition for modification of the opinion and judgment be, and it is hereby, denied.

Per Curiam.

Dated: October 2, 1950.

United States Court of Appeals for the District of Columbia Circuit, Filed October 2, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 7, 1950. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 10007, 10008

ROBERT D. ELDER, GREENE CHANDLER FURMAN, APPELLANTS,

v.

CHARLES F. BRANNAN, SECRETARY, DEPARTMENT OF AGRICULTURE, APPELLEE

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition for writ of certiorari to the Supreme Court of

the United States in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. Petition for rehearing.
6. Order denying petition for rehearing.
7. This designation.
8. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

November 6, 1950.

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing designation of record have been mailed to the following:

C. L. Dawson, 917 15th St., N. W., Washington 5, D. C.

Robert D. Elder, 4233 32nd Road South, Arlington, Virginia, pro se.

Attorney pro se.

PHILIP B. PERLMAN,
Solicitor General.

November 6, 1950.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered from 1 to 101, both inclusive, constitute a true copy of the joint appendix, and of the pleadings and proceedings of the said Court of Appeals as designated by counsel in the cases of: Robert D. Elder, Appellant, v. Charles F. Brannan, Secretary of Agriculture, Appellee, Greene Chandler Furman, Appellant, v. Charles F. Brannan, Secretary of Agriculture, Appellee, Nos. 10007 and 10008, October Term, 1950, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twentieth day of November, A. D. 1950. Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit. (Seal.)

In the Supreme Court of the United States

October Term, 1950

No. ———

CHARLES F. BRANNAN, SECRETARY, DEPARTMENT OF AGRICULTURE, PETITIONER

v.

ROBERT D. ELDER, GREENE CHANDLER FURMAN, RESPONDENTS

STIPULATION

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari the printed record shall consist of the following:

(a) Joint appendix
(b) Minute entry of argument
(c) Opinion
(d) Judgment
(e) Petition for rehearing
(f) Order denying petition for rehearing
(g) Designation of Record
(h) Clerk's certificate

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the Supreme Court of the United States the entire transcript of record, and it is agreed that the parties hereto may refer in their briefs to said transcript of record, including any part which has not been printed.

PHILIP B. PERLMAN,
Solicitor General
Counsel for Petitioner.

———

Counsel for respondents.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 919384 375

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File endorsement omitted.]

No. 10007

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

Appeals from the District Court of the United States for the District of Columbia

Petition for modification of opinion and judgment

Filed June 30, 1950

Now come the appellants by their counsel, and, upon the grounds herewith presented, petition this Honorable Court to modify its opinion rendered June 15, 1950, and the respective judgments pursuant thereto, in the indicated particulars:

By striking out the thirty-four lines relating to veterans' retention preference appearing on pages 3 and 4 of the printed slip Opinion [viz "Elder's preference does not arise * * * it does not appear that his preferential right to be retained was directly violated."]; and by amending same in accordance with undenied allegations in the record and the principles applicable thereto.

1. This Court correctly held (Opinion, 3) that

Elder has veterans' preference under the Veterans' Preference Act of 1944, and particularly under §§ 2 and 12. The latter provides that

"In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *"

2. This Court erred in misquoting, misapplying, and failing to hold in accordance with the holding of this Court in Hilton v. Forrestal.

In Hilton v. Forrestal, 83 U. S. App. D. C. 44, 165 F. (2d) 251, 253, this Court held that

"*The proviso in Section 12 is that preference employees shall be retained in preference to all other 'competing' employees.* We think that refers to employees competing within the bounds of such classifications as the Commission may establish by regulations *giving 'due effect' to the four factors named.* [Emphasis of omitted portions added.]

This Court thus held that the proviso in Section 12 is that preference employees shall be retained in preference to all other employees competing within the bounds of such classifications as the Commission might establish by regulations giving "due effect" to the four factors of tenure of employment, military preference, length of service and efficiency ratings.

Such holding and interpretation is in harmony with the settled rule which requires the determination herein that the applicable proviso in § 12 was intended by Congress to take the special class of veterans' preference employees, whose efficiency ratings are "good" or better, *out of the operation of the section 12 in which it is found*, and to withdraw and except said special class of veterans' preference employees, whose efficiency ratings are "good" or better, *from the operation and operative effect of the general terms* of the first clause of § 12 *which authorize and require that "competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings.*" McDonald v. United States, 279 U. S. 12, 20–21; United States v. McElwain, 272 U. S. 633; United States v. Morrow, 266 U. S. 531, 534–535; Cox v. Hart, 260 U. S. 427, 435; Schlemmer v. Buffalo R. & Ry. Co., 205 U. S. 1, 10; White v. United States, 191 U. S. 545, 551; Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 242–246; Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 181; Minis v. United States, 15 Pet. 423, 445. See, also, the decision of this Court in United States ex rel. Bride v. MacFarland, 18 App. D. C. 120, 126.

The language employed by the Supreme Court, in applying this well-established rule in several of the cases above cited, follows herewith.

"As a general rule, a proviso is intended to take a special class of cases out of the operation of the body of the section in which it is found (cit. cases). But a proviso is not always limited in its effect to the part of the enactment in which it is found; it may

apply generally to all cases within the meaning of the language used." McDonald v. United States, 279 U. S. 12, 20.

"The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or to restrain the generality, of the substantive enactment to which it is attached. Cox v. Hart, 260 U. S. 427, 435.

"The general office of a proviso is to except something from the enacting clause, or to qualify and restrain this generality and to prevent misinterpretation." United States v. Morrow, 266 U. S. 531, 534.

"The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generalities, or *to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview.*" Potomac Tel. Co. v. Manning, 186 U. S. 238, 242.

"The general rule of law is that a proviso carves special exceptions only out of the body of the act." Schlemmer v. Buffalo, R. & Ry. Co., 205 U. S. 1, 10.

"The purpose of the added proviso was to carve out a special class of cases." United States v. McElwain, 272 U. S. 633.

There is consequently no escape from the conclusion that Elder's preferential right to be retained in his position of Attorney, Grade P–3, is independent of and not affected by his own tenure of employment or that of any other competing employees who are without veterans' preference. His right to be retained is not subject to that factor of tenure of employment, and is not in any way conditioned upon tenure of employment except as between Elder and some other veteran who has permanent tenure. For the same reason Elder's preferential right to be retained is not subject to or conditioned upon the factor of length of service as between such veteran and nonveterans. Cf. Hilton v. Sullivan, 334 U. S. 323, 335, where the factor of length of service was alone involved, and tenure of employment was not, since the controversy was resolved as between veterans and nonveterans of the same permanent tenure of employment.

3. This Court erred in failing clearly to hold that—

Undenied allegations in the record clearly show that Elder is an honorably discharged ex-serviceman who served on active service in the infantry branch of the armed forces of the United States during World War I (R. 50, 3) within the provisions of § 2 of the 1944 Act commanding that preference shall be given to such veterans in retention, as well as reinstatement and reemployment, in civilian positions, classified or unclassified. These undenied allegations also clearly show that Elder had at all times an efficiency rating of "good" or better in his civilian position

of Attorney, Grade P–3 (R. 50, 3) within the provisions of § 12 of the 1944 Act commanding that preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees.

4. This Court erred in failing to consider undenied allegations in the record (R. 47–48) showing that—

"A few days after May 29, 1947, the plaintiff examined and made penciled memoranda of the names and of the assigned 'retention Subgroups' as assigned to Attorneys, Grade P–3, set out in the official retention register of employees in the Washington office of the Office of the Solicitor, United States Department of Agriculture. Under retention Subgroup A–2 therein appeared the names of five women and three men, each one of whom was then and is now known by plaintiff to be employed on active duty for several years past in a position of Attorney, Grade P–3, in said Washington office of the Office of the Solicitor. Each one of said eight Attorneys, Grade P–3, thus assigned by defendant to retention Subgroup A–2, is carried on the records of the Office of the Solicitor as (1) Without veteran preference. (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service.

"Each of said eight Attorneys, Grade P–3, thus in retention Subgroup A–2, has been retained in his or her position of Attorney, Grade P–3 at all times since June 6, 1947, and continues to be employed on active duty in said Washington office of the Office of the Solicitor as of September 5, 1947, the date of this affidavit. Under retention Subgroup B–1 in said official retention register appeared the names of three men, including plaintiff, each one of whom received an identical separation notice May 29, 1947, and has been finally and completely separated in the same manner as plaintiff. Like plaintiff, each one is carried on the records of the Office of the Solicitor as (1) With veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter" (R. 47–48).

and showing that (R. 50–51)—

"29. During all times since June 6, 1947, the defendant and his agents have wrongfully excluded the plaintiff, Robert D. Elder, from employment and active duty in his position of Attorney, Grade P–3, in the Washington office of the Office of the Solicitor, United States Department of Agriculture; and since June 6, 1947, the defendant has employed and continued in employment in wrongful preference to plaintiff other competing employees, the same being nonveterans' preference Attorneys, Grade P–3, who have been and still are performing work, functions, and duties which were formerly performed by plaintiff with an efficiency

rating of 'very good,' as well as assuming to perform functions and duties which plaintiff was and is capable of performing" (R. 50).

5. This Court erred in failing to hold that

These undenied allegations charge a direct violation of Elder's preferential right to be retained in his position of Attorney, Grade P–3, under §§ 2 and 12 of the Veterans' Preference Act of 1944.

6. This Court erred in failing to hold that

If the record remains as it is, the District Court should enter summary judgments to the effect that on June 30, 1947, and during all times thereafter, each of the appellants was wrongfully denied and deprived of his preferential right to be retained in his position of Attorney, Grade P–3. However, if the Secretary of Agriculture denies such allegations, the District Court should, of course, proceed to determine the issue of fact so presented.

7. This Court erred in declaring (Opinion, 3–4) that in the Hilton case this Court and the Supreme Court approved all group and subgroup classifications of the 1947 Retention Preference regulations of the Civil Service Commission cited to 5 Code Fed. Regs. § 20.3, Supp. 1947.

The question of validity of Groups B or C, or of any other than the validity of the absolute retention preference provided under subgroups A–1 plus and A–1, was not raised or ruled upon at any stage in the Hilton case, either in this Court or in the Supreme Court. Even the validity or nonvalidity of subgroups A–2, to which the nonveteran Hilton was assigned, was never raised or ruled upon, since Hilton's right to retention in that case, as against the A–1 plus and A–1 veterans who were alone retained in preference to Hilton, could not in any way be affected by any such consideration or determination.

There was at no time any assignment of error presenting any such question related to subgroups A–2 or A–4, or related to Groups B or C or the retention preference of any veterans of limited tenure of employment; and no argument whatever on any such question was ever presented to the Court of Appeals or to the Supreme Court in the Hilton case.

As repeatedly stated by the Supreme Court in the same terms in many other cases:

"The most that can be said is that the point was in the record if anyone had seen fit to raise it. Questions that merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Kvos v. Associated Press, 299 U. S. 269, 279; Webster v. Fall, 266 U. S. 507, 511; Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 119; New v. Oklahoma, 195 U. S. 252, 256.

Instead of a bulk approval and affirmance in toto of the 1947 regulations or of the primary division of veterans between Groups A, B, and C, based on the tenure of their employment [as argued here by counsel for appellee, Br. 16, to the misguidance of this Court], the Supreme Court took particular pains to point out that the categorical assignment of nonveteran employees of classified (permanent) tenure to the "highest retention status" under Group A, and the assignment of veterans of limited tenures to lower retention status, as these appellants under Group B, was

"* * * regardless of veterans' preference and of efficiency rating * * *"

Hilton v. Sullivan, 334 U. S. 323, 337, the Court's footnote 10.

This footnote 10 explicitly attests the Supreme Court's awareness of the disregard and violation inherent in both the 1943 and 1947 Retention Preference regulations of the Civil Service Commission insofar as they affect the retention preference rights of veterans of limited tenure, as the appellants here. The legal soundness of the Court's indication of this inherent violation of the Veterans' Preference Act of 1944 is not abated by reason of its being obiter dictum. Webster v. Fall, and other cases last above cited.

8. This Court erred in approving and applying as valid herein the subgroups A–2, A–4, and B–1 of the 1947 regulations of the Commission.

The classifications of the 1947 regulations proceed upon the untenable assumption that the applicable proviso of § 12 is nothing but meaningless surplusage.

By the device of Groups A, B, and C, the 1947 regulations give effect to "tenure of employment" as the primary and paramount criterion for relative retention preference among all employees. "Military preference," mentioned second after "tenure of employment" in the first clause of § 12, is given effect only as a sort of minor abscissa within and subordinated to the aforesaid primary and paramount criterion of "tenure of employment" expressed in the subgroups A–1, A–2, A–3, A–4, covering permanent tenure of employment; B–1, B–2, B–3, B–4, covering "war-service" tenure of employment; C–1, C–2, C–3, C–4, covering temporary or less-than-one-year tenure of employment. It is to be noted particularly that

A–2 comprises nonveterans of permanent tenure of employment "unless efficiency rating is less than 'good'."

A–4 comprises nonveterans of permanent tenure of employment "where efficiency rating is less than 'good'."

B–1 comprises veterans' preference employees "With veteran preference unless efficiency rating is less than 'good'."

"Tenure of employment" is thus given effect as the "highest retention status" with permanent employees given priority over all veterans' preference employees whose efficiency ratings are "good" or better as well as nonveterans of limited tenures. As pointed out by the Supreme Court, this "highest retention status" is "regardless of veterans' preference and of efficiency rating." Hilton v. Sullivan, 334 U. S. 323, 337, the Court's footnote 10.

What the Supreme Court had in mind is very clear. The 1947 regulations make the criterion of "tenure of employment" decisive in the determination of relative retention rights between all employees—including as well the proviso-excepted special class of veterans' preference employees whose efficiency ratings are "good" or better. This special class of veterans' preference employees appears in subgroups A–1, B–1, and C–1.

But this is the special class of preference employees concerning which Congress has significantly attached to the first clause of § 12 and enacted the absolute command:

"* * * *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all competing employees, * * *"

The closest inspection and scrutiny fails to reveal that the seriatim classification scheme of the 1947 regulations takes into account in any way whatever this applicable proviso which, as the Supreme Court has explicitly recognized, is "the heart of the section." Hilton v. Sullivan, 334 U. S. 323, 338.

Obviously, this seriatim classification scheme of the 1947 regulations is set up with reference to the first clause only. It is set up to the entire exclusion of the applicable proviso commanding the exception of the proviso-defined veterans' preference employees from the operative effect of the first clause of § 12. Most obviously, the only veterans' preference given by the regulations to Elder and other members of the proviso-excepted special class of veterans is wholly confined to the "sort of seriatim effect" given the inferior secondary factor of "military preference" in accordance to its position after "tenure of employment" in the first clause of § 12.

The entire scheme and procedure of the 1947 Retention Preference regulations was without the shadow of a doubt set up exclusively in contemplation and with reference to the seriatim order of the four factors of tenure of employment, military preference, length of service, and efficiency ratings in the first clause of § 12. The applicable proviso plainly had nothing to do with any of it.

The administrative construction embodied in the 1947 regulations of the Commission disregarded the applicable proviso with a sort of selective blindness. It plainly misconstrued the first

clause alone as being the only "congressional directive" which either the Commission or appellee was under any obligation to obey or even consider. (Appellee's Br. 15–16.) For them the proviso was not simply meaningless; it was non-existent.

The subgroups A–2, A–4, and B–1 thus embodied an administrative construction which gave meaning and effect only to the first clause of § 12, and left the applicable proviso wholly out of consideration. The Civil Service Commission thereby assumed the legislative power of altering, amending, and modifying this Act of Congress by amputating, subtracting, and eliminating the applicable proviso which contains an absolute command of the Congress. The 1947 regulations of the Commission then proceeded to give effect, of a sort, to the first clause alone. This, of course, is contrary to settled law.

Administrative rulings cannot add to, or subtract from, the terms of an Act of Congress. United States v. Standard Brewery Co., 251 U. S. 210, 217–220; Miller v. Standard Nut Margarine Co., 284 U. S. 498, 508; Schanzer v. Bowles, Price Administrator, Em. Ct. App., 141 F. (2d) 262, 264; Durkee Famous Foods, Inc., v. Harrison, 7 Cir., 136 F. (2d) 303, 307.

As succinctly held by the court in Kaufman v. United States, 131 F. (2d) 854, 857 (CCA–4, 1942):

"It needs no argument that he cannot, by such regulations, alter or amend an Act of Congress or limit rights granted by it."

As held by the Supreme Court in Campbell v. Galeno Chemical Co., 281 U. S. 599, 610:

"The limits of the power to make regulations are well settled (cit. cases). They may not extend a statute or modify its provisions."

And in Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U. S. 129, 134, the Supreme Court said:

"The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws—for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

See, elaborating upon the same point: Field v. Clark, 143 U. S. 649, 692; United States v. Eaton, 144 U. S. 677, 687; United States v. Grimaud, 220 U. S. 506, 518; Utah Power & Light Co. v. United States, 243 U. S. 389, 410; Panama Refining Co. v. Ryan, 293 U. S. 388, 428; Schechter Poultry Corp. v. United States, 295 U. S. 495, 537–538; International Ry. Co. v. Davidson, 257 U. S. 506, 514; Corner Broadway-Maiden Lane, Inc., v. Commissioner of Internal Revenue, 76 F. (2d) 106, 108 (CCA–2, 1935); Commissioner of

Internal Revenue v. Van Vorst, 59 F. (2d) 677, 679 (CCA–9, 1932); Allis v. La Budde, 128 F. (2d) 838, 840 (CCA–7, 1942).

Subgroups A–2, A–4, and B–1 of the 1947 regulations are also contrary to other elementary principles of statutory interpretation.

The intention of the Congress is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. Thompson v. United States, 280 U. S. 420, 442; and cases cited infra.

The words used by Congress in a statute are presumed to be used in their natural import and usual and most ordinary sense, and with the meaning commonly attributed to them. Caminetti v. United States, 242 U. S. 470, 485; United States v. Lexington Mill & Elevator Co., 232 U. S. 399, 409–410; Dewey v. United States, 178 U. S. 510, 520, 521.

"All other competing employees" thus means all competing employees other than preference employees whose efficiency ratings are "good" or better. United States v. Mescall, 215 U. S. 26, 31–32.

This meaning is unnecessarily corroborated by the correlative use of the words "competing nonpreference employees" in the next ensuing proviso contained in the same paragraph of § 12.

"Competing", in its natural import and usual and most ordinary sense according to Webster's New International Dictionary, means "seeking or striving for the same thing, position, or reward for which another is striving"—as here, the positions of Attorneys, Grade P–3 which are the subject of these suits.

Arguing for a holding of the validity of subgroups A–2, A–4, and B–1, and of the validity of the classification of the appellants, as preference employees whose efficiency ratings are "good" or better, under subgroups B–1 inferior to the non-veteran non-preference employees under A–2 and A–4, counsel for appellee urge: "They were entitled to no more under the Act and the regulations. To hold otherwise would emasculate the civil service so that a veteran with the most limited appointment would have preference over a civil servant with permanent classified status."

But as the Supreme Court has on many occasions declared and held:

"Considerations of this nature or of inconvenience can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language." Houghton v. Payne, 194 U. S. 88, 100; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 330, 331; Brewster v. Gage, 280 U. S. 327, 336; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Louisville & Nashville R. Co. v. United

States, 282 U. S. 740, 757, 759; Texas & Pac. R. Co., v. United States, 289 U. S. 627, 640; United States v. Tanner, 147 U. S. 661.

However long continued by successive officers, an administrative construction of a statute must yield to the positive language of the statute. Houghton v. Payne, 194 U. S. 88, 100; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 330, 331; Brewster v. Gage, 280 U. S. 327, 336; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Louisville & Nashville Ry. Co. v. United States, 282 U. S. 740, 757, 759; Texas & Pac. Ry. Co. v. United States, 289 U. S. 627, 640; United States v. Tanner, 147 U. S. 661.

Under the positive language of § 12 of the 1944 Act, considered in connection with the positive language of § 2 thereof, appellee was clearly and mandatorily required to retain the appellants, as veterans' preference employees whose efficiency ratings are "good" or better, in their civilian positions of Attorneys, Grade P–3, in preference to all other nonveteran nonpreference Attorneys, Grade P–3; and appellee's admitted failure so to do violated the appellants' legal rights under the Veterans' Preference Act of 1944 and §§ 2 and 12 thereof.

Wherefore, the premises considered, your petitioners respectfully pray that modification of the opinion, and of the respective judgments pursuant thereto, be granted in the particulars indicated.

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Attorney pro se and pro hac vice by special leave of this Court.

Received by each of the undersigned, one copy of the within Petition for modification of opinion and judgments, this 30th day of June 1950.

George Morris Fay,
by J. Langer,
Attorneys for Appellee,
the Secretary of Agriculture.

In the United States Court of Appeals for the District of Columbia Circuit

[Title omitted.]
[File endorsement omitted.]

Supplemental designation of record

Filed January 3, 1951

The Clerk will please prepare a certified copy of appellants' petition for modification of the opinion and judgment for use on petition for writ of certiorari to the Supreme Court of the United States in the above-entitled cause.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

JANUARY 2, 1951.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above supplemental designation of record has been served on counsel for respondents by mail.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

[Clerk's certificate to foregoing papers omitted in printing.]

Supreme Court of the United States

No. 473, October Term, 1950

Order allowing certiorari

Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 474, October Term, 1950

Order allowing certiorari.

Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.